Madras High Court Reports.

REPORTS OF CASES

DECIDED IN THE

HIGH COURT OF MADRAS

IN

1868 and 1869.

BY

P. O'SULLIVAN,

BARRISTER-AT-LAW.

[VOL. IV.]

MADRAS:

J. HIGGINBOTHAM, MOUNT ROAD.

Law Bookseller and Publisher.

1870.

BIBL. CODR. COLL. OMN. ANIM. OXON.

MADRAS HIGH-COURT REPORTS.

Appellate Jurisdiction (a)

Referred Case No. 45 *of* 1867.

KARUPPAN CHETTI *against* VERIYAL and 2 others.

In a suit upon a bond, the plaintiff having sued the defendants, not on the ground of their personal responsibility, but as the legal representatives of the obligor, who was supposed to be dead :—

Held, that the suit is not mantainable before the lapse of the time which raises the legal presumption of the death of the obligor, unless there is proof of special circumstances which warrant the inference of his death within a shorter period.

Section 14, Act XIV of 1859, applies to the case in which the plaintiff is unable, after due diligence, to procure due service upon the defendant of the summons to appear and answer the claim, and consequently to prosecute the suit to a decision, and will prevent a suit against the defendant's representatives from being barred.

CASE referred by P. Cabálya Pillai, the Acting District Munsif of Strivilliputtúr in Suit No. 385 of 1867. The suit was brought for the recovery of Rupees 29-7-0 due on a bond executed in March 1861, by one Velliakone who had been absent abroad for some years past and had not been heard of. Plaintiff sought to recover from the wife and undivided brothers of the obligor. The Munsif referred the question whether the action was maintainable, the obligor not having been absent abroad, without tidings, for the period prescribed by Hindu Law as raising a presumption of death.

1868. *January* 3. *R. C. No.* 45 *of* 1867.

No Counsel were instructed.

The Court delivered the following

JUDGMENT :—We understand that the plaintiff does not set up the personal liability of the 2nd and 3rd defendants on the bond, but brings his suit against them and the widow on their liability as legal representatives of the obligor, who is supposed to be dead. That being so, our

(a) Present : Scotland, C. J. and Collett, J.

1868. January 3. R. C. No. 45 of 1867.

opinion on the first question is that the suit is not maintainable before the lapse of the time which raises the legal presumption of the death of the obligor, unless there is proof of special circumstances which warrant the inference of his death within a shorter period. The reasonableness of the evidence to warrant this inference in the present case is for the consideration and decision of the Munsif. If no such evidence is forthcoming and it is desired to avoid the bar under the Act of Limitation, the proper course is to institute a suit against the obligor, giving his last known place of abode, and if, after due diligence, the plaintiff is unable to procure due service of the summons to appear and answer the claim and consequently to prosecute the suit to a decision, Section 14 of the Act of Limitation would, it seems to us, apply and prevent a suit against his representatives being barred. With reference to the observation in para. 6 of the case it is only necessary to say that, in a suit against representatives as such, there cannot be a decree against them for anything beyond the amount of the assets of the deceased debtor.

Appellate Jurisdiction (a)

Regular Appeal No. 105 *of* 1867.

Y. K. K. A. M. R. C. JEYANGARU-LAVARU and another............ } *Appellants. (Plaintiffs.)*

SRI HATI R. M. M. DURMA DOSSJI. { *Respondent. (Defendant.)*

Act XX of 1863 does not apply to a suit brought by the Dharmakarta of a temple and one of its worshippers to compel the defendant, as heir of the late manager, to make good, out of the property inherited by him, the deficiency in the Devasthánum funds caused by breach of trust and misappropriation by the late manager.

The leave of the Civil Court for the institution of such a suit is not necessary and the suit is maintainable.

The right of instituting such suits is not a privilege accorded by Act XX of 1863, but a pre-existing right.

1868. February 12. R. A. No 105 of 1867.

THIS was a Regular Appeal from the decision of O. B. Irvine, the Acting Civil Judge of Chittúr, in Original Suit No. 18 of 1867.

(a) Present: Scotland, C. J. and Ellis, J.

The *Advocate General* and *Ráma Ráu* for the appellants, the plaintiffs. 1868. *February* 12. *R. A. No.* 105 *of* 1867.

Mayne for the respondent, the defendant.

The facts sufficiently appear in the following

JUDGMENT:—This is a suit by the Dharmakarta of the temples of Terumala and Terupati in Chendragiri Taluq in the Chittúr Zillá, and by one of the worshippers frequenting such temples, to compel the defendant as the heir of Shivadoss, the late manager, to make good out of the property inherited by him the deficiency in the Devasthánum funds owing to the misfeazance, breach of trust and misappropriation of the late manager. The defendant's written statement contains a denial of the plaintiffs' right to sue, on the ground, amongst others, that the leave of the Court had not been obtained under Section 18 of Act XX of 1863, and a denial also of the defendant's liability.

On the day of first hearing, the Lower Court, it appears, gave judgment against the plaintiffs without recording any issue, on the ground that a suit against a deceased trustee or manager is not provided for by Act XX of 1863, and that the privilege of persons in the plaintiff's position to sue for breach of trust in respect of Devasthánum property does not exist independently of that Act, and thereupon a decree was passed dismissing the suit, against which the plaintiffs have appealed.

The questions to be determined are, first, whether Act XX of 1863 applies to the case and if it does not, secondly, whether the plaintiffs can maintain the suit, and for the purpose of deciding both questions we must of course assume the truth of the material statements in the plaint. On the first point the Lower Court's decision, we think, is right. The suits to which the Act relates are such as come within the provision in Section 14, and that plainly applies only to suits against trustees, managers, or superintendents, or the members of a District Committee whilst in office.

But on the second point, we are of opinion that the decision of the Lower Court is wrong. There can be no

1868. February 12. R. A. No. 105 of 1867.

doubt that before the passing of the Act, a Dharmakarta of a temple might have maintained a suit on behalf of himself and all others interested in the temple of which he was the Dharmakarta, to compel a defaulting trustee, or his legal representative to account for the property and funds of the temple and to make good the loss occasioned by the trustee's misconduct. The right of suit in this case is not therefore, as the Civil Judge expresses it, a privilege accorded by Act XX of 1863, for purposes under that Act only, but a pre-existing right, and the provisions of the Act were clearly, we think, intended to extend and not restrict the remedy by suit for breaches of trust and neglect of duty by the trustees, managers, or superintendents of religious establishments. They render it unnecessary that suits against such officers should be brought by persons having a pecuniary, official, or even a direct or immediate interest, and declare that habitual attendance as a worshipper, or participation in the benefits of any distribution of alms shall be a sufficient interest. It would be a strange anomaly if the property of a deceased trustee could not be made liable in the hands of his legal representative except by the succeeding trustee, when very often the latter is himself the legal representative, as is the case here.

We are consequently of opinion that the first plaintiff's interest as Dharmakarta entitled him to sue and that he might join the second plaintiff with him, and the Act not applying to the case, that they were at liberty to institute the suit without the previous leave of the Civil Court. The decree must therefore be reversed and the case remanded for the settlement of proper issues and hearing and determination upon its merits.

The appellants' costs of the appeal should, we think, be borne by the respondent, and the costs in the Lower Court must abide the final determination of the suit.

Appeal allowed.

Appellate Jurisdiction (a)

Regular Appeal No. 70 *of* 1867.

RAMASHESHAIYA PANDAY.................*Appellant.*

BHAGAVAT PANDAY.. ....*Respondent.*

Regular Appeal No. 32 *of* 1868.

BHAGAVAT PANDAY........................*Appellant.*

RAMASHESHAIYA PANDAY.................*Respondent.*

In a suit in which the question was whether there had been a division the sole evidence of division was the decision of a panchayat reciting that division; the question, however, not having been at all material to the point then in dispute. *Held*, that the decision was not sufficient evidence of the division.

Property acquired by a Hindu while drawing an income from his family is liable to partition and the quality of the fund cannot be altered by the mode of its investment.

1868. *February* 21. *R. A. Nos.* 70 *of* 1867 & 32 *of* 1868.

THESE were Regular Appeals against the Decree of H. S. Thomas, the Acting Civil Judge of Chingleput, in Original Suit No. 22 of 1864. The suit was brought for a share in ancestral property. The first defendant pleaded division and relied upon the award of a panchayat made when plaintiff was a minor. The question of division, however, was not in issue in the dispute regarding which the panchayat was convened. The Civil Judge decreed for the plaintiff. The defendant appealed.

Mayne for the appellant, the 1st defendant, in No. 70 of 1867.

G. E. Branson for the respondent, the plaintiff, in No. 70 of 1867.

G. E. Branson for the appellant, pauper plaintiff, in No. 32 of 1868.

Mayne for the respondent, the 1st defendant, in No. 32 of 1868.

The Court delivered the following

(a) Present, Scotland, C. J. and Holloway, J.

1868. *February* 21. *R. A. Nos.* 70 *of* 1867 & 32 *of* 1868.

JUDGMENT :—In this case the question is whether there was a division in 1845. The sole evidence of that division is a decision of a panchayat reciting that division in 1845. That panchayat, so far as we are aware, was simply called to determine a dispute between defendant and plaintiff's mother as to a mortgage of what is alleged in the so-called award to have been the self-acquired property of plaintiff's father.

It does not appear that the question of division was at all material to the point then in dispute, and there is nothing whatever to show that the mother's admission ought in any way to bind the plaintiff. Even if it were otherwise No. 1, as well as Nos. 2, 4 and 5, amount simply to admissions, and they are contradicted by the admissions of defendant in 1850, in suits instituted by him in which he calls himself the undivided brother of plaintiff's father. This can only mean that the brothers were undivided at the death of the elder and the effect of the whole evidence is in accordance with the presumption of non-division.

The ground on which the Judge has awarded one-third of the property instead of one-half seems untenable. His own finding is that this property was acquired by defendant while drawing an income from the family property. This rendered all defendant's acquisitions primarily liable to partition, and the distinction taken by the Civil Judge as to so much of the funds as are invested either in land or money seems quite untenable. The quality of the fund clearly could not be altered by the mode of investment. The result therefore is, that the decree will be modified and plaintiff declared entitled to one-half the property found by the Civil Judge to be in defendant's possession. The appeal in 70 will be dismissed with costs and there will be no costs of the pauper appeal *(a)*, but the calculated value of the stamp will be paid by the original defendant to the Government.

(a) R. A. 32 of 1868.

Original Jurisdiction (a)

Original Suit No. 570 *of* 1867.

P. SASHANNAH CHETTI..................*Plaintiff.*

P. RA'MASA'MY CHETTI..................*Defendant.*

A contract to pay money upon the consideration that the plaintiff would give evidence in a Civil Suit on behalf of the defendant cannot be enforced.

Such a contract is either for true evidence and then there is no consideration, or for favourable evidence either true or false, and then the consideration is vicious.

Semble, If the consideration had been the plaintiff's promise not to evade process that would still be no consideration for the defendant's undertaking.

1868. *February* 25. *O. S. No.* 570 *of* 1867.

THIS suit was brought upon a promissory note for Rupees 800, made by defendant and delivered to plaintiff. The defendant requested the plaintiff to give evidence on his behalf in a suit which the defendant had instituted in 1866, to compel a division of undivided family property, and made the promissory note sued on as remuneration for his trouble. The plaintiff was not examined as a witness on behalf of the defendant though he had been served with a subpœna to attend and give evidence. The plaintiff was the uncle of the defendant and was well acquainted with the state of the family to which the suit of 1866 related.

The issue was whether the plaintiff had given any legal consideration for the promissory note. mentioned in the plaint.

Mayne for the plaintiff.

The *Advocate General* for the defendant.

The Court delivered the following

JUDGMENT.—This is a suit upon a promissory note and on this issue the plaintiff must recover, unless it was given without consideration, or for a vicious consideration.

(*a*) Present : Holloway, J.

1868. *February* 25. *O. S. No.* 570 *of* 1867.

The facts are that defendant was litigating with his cousin for a share of family property, and asked plaintiff, also a member of the family, to assist him by giving evidence. The plaintiff enquired what he should get by doing so, and demanded Rupees 1,000, but after some negotiation agreed to take this note. He was served with a subpœna, but defendant, hearing that he had joined his opponent, did not examine him.

It is quite clear that if a subpœna had been served, and this note had been given to compensate plaintiff for his loss of time or other inconvenience, it would have been without consideration, because his attendance and the giving of evidence would have been merely the performance of a duty imposed upon him by law (*Willis* v. *Peckham,* 4 Moore, 300, and *Collins* v. *Godefroy,* 1 B. & Ad. 956). Mr. Mayne referred to the cases in which promises of rewards to Constables have been held to create obligations enforceable on the performance of the service, as shewing that the cases of extra rewards promised to seamen are exceptional, and that it is not a rule of English Law that the mere performance of that which a man is legally bound to perform is not a consideration.

England v. *Davidson* (11 Ad. and El. 856) the leading case upon this matter, treats the rule as inflexible, but Lord Denman, delivering the judgment of the Court says, " I think there may be services which the Constable is not bound to render and which he may therefore make the ground of a contract," and Mr. Ingham, for the plaintiff, says, " the Constable was not bound to procure evidence." This case therefore does not contradict but enforces the principle that the performance of a legal duty is no consideration for a promise. Mr. Mayne, however, further contended that until the witness was served with a subpœna, he was justified in either shutting himself up in his house or betaking himself to a distant country to avoid service, and that the agreement patiently to await the subpœna, and sufier the extreme inconvenience of giving evidence, was ample consideration. The latter part of the proposition is clearly untenable, the inconvenience is

merely incidental to the legal duty, which is no considera- 1868.
tion even for an express promise to compensate. There is *February* 25.
not a shadow of evidence of any contract not to evade the *O. S. No.* 570 *of* 1867.
subpœna, the contract was to give evidence if served. If, however, there were such evidence, the promise of plaintiff would then amount to saying. " If you will promise to pay me rupees 800, I will promise not to take any steps to prevent you from having any evidence to which you are entitled, if you want it." It may be that the evasion would be neither punishable nor actionable, but seeing that it is the legal duty of every citizen to give evidence when called upon, the taking of steps to evade that legal duty must be at least morally wrong. It is a *maleficium.* An agreement not to do that which is morally wrong can scarcely be said to be a consideration, and the Roman Law, to which Wilmot, C. J., referred in *Collins* v. *Blantern,*(a) declared conventions of this kind absolutely void. The reference to the Digest in the report is wrong, but the principle is stated in b. 7, a. 3 *de pactis* (2-14) *si ob maleficium ne fiat promissum sit, nulla est obligatio ex hâc conventione.* If therefore, the consideration of this promissory note had been the plaintiff's promise not to evade process, I should not have hesitated to say that this is no consideration at all. The only contract was Rupees 800 for the evidence. This was either for true evidence, and then there was no consideration, or for favorable evidence either true or false, and then the consideration was vicious. I have not much doubt as to which of the alternatives was meant and understood to be meant. I will not waste a word as to the obvious tendency of such agreements. I find the issue in favor of the defendant, but it is not a case for costs, and the suit will be dismissed without costs.

Suit dismissed.

(a) Smith's L. C. 310 (Fifth edition).

Appellate Jurisdiction (a)

Special Appeal No. 297 *of* 1867.

SRI'NIVASSIENGA'R..........................*Special Appellant.*

SRI'NIVASSARANGA CHA'RIYA'R......*Special Respondent.*

A. B. and C. were brothers. In 1846 and 1847, a partition was effected between A. since deceased and C. on the one part and B. on the other, C. the plaintiff being at the time a minor. B. the defendant then obtained and since held separately as his share certain lands in the village of K. among others. By a raziuama in 1852, the same quantity of land was confirmed to him as his share. In 1855, certain proceedings were taken the object of which was to adjust the shares so as to make them equal in quality as well as in quantity, B. the defendant continuing to hold nearly the same quantity of land as he did before. C. attained his majority in 1854, and in December 1863, brought a suit for a re-adjustment of the partition completed in 1847, so far as it respected the lands held by defendant in the village of K.

Held, that the suit was barred by the Act of Limitations.

1868. *February* 28. *S. A. No.* 297 *of* 1867.

THIS was a Special Appeal from the decision of R. G. Clarke, the Civil Judge of Tranquebar, in Regular Appeal No. 291 of 1865, confirming the decree of the Court of the District Munsif of Tritrapundy, in Original Suit No. 486 of 1864.

Sanjiva Ráu for the special appellant, the defendant.

The *Advocate General, Mayne* and *Srínivása Cháriyár*, for the special respondent, the plaintiff.

The facts sufficiently appear in the following

JUDGMENT :—In this suit the plaintiff sues for a re-adjustment of the partition made between the defendant and plaintiff's deceased brother, under which the defendant is in possession of a certain quantity of land in the village of Kadumbamgudi in excess of the share to which the defendant was legally entitled. It must now be taken for the purposes of this special appeal that the documents 1, 2 and 5, executed in 1846 and 1847, are genuine. It is also the finding of both the Lower Courts that the defendant has failed to shew that any portion of the land subjected to partition was the Stridhanam of defendant's mother.

(a) Present : Collett and Ellis, J. J.

Further we must take it to have been found by both the Lower Courts that, at the date of the razinamah, exhibit A., the plaintiff was still a minor, and indeed we may assume it to be true, as alleged by plaintiff, that he attained his majority in 1854. In fact it seems to us immaterial for the purposes of this suit when the plaintiff became a major. If the adverse possession of the defendant began in 1847, then if the plaintiff was at that time a minor, he had twelve years from that date, or three years from the termination of his minority, whichever period last expired, within which to bring his suit; and as this suit was not instituted till the 21st December 1863, it is clear that both twelve years from 1847, and three years from 1854, had then expired. But if the adverse possession of the defendant did not begin in 1847, then it could not have begun till after the razinamah in September 1852, and as the present suit was brought within twelve years from that date, it would be in time though the plaintiff was a major in 1852.

The Civil Judge on the trial of the issues sent down by us has found that the adverse possession of the defendant began in 1846, and the only question for our consideration sitting in special appeal is, whether the facts as found by the Civil Judge would or would not in law amount to adverse possession, or in other words, whether there was any evidence which could justify the finding of the Civil Judge.

It is necessary to bear in mind the exact nature of this suit, what is the wrong complained of, and what the relief sought for. It appears from the documents established in the case, and particularly from the razinamah, that this family possessed lands and property in other villages besides Kadumbamgudi. The plaintiff does not appear to complain of the partition in other respects; what he complains of is, that the partition of the lands in Kadumbamgudi was to the injury of his rights, because the defendant obtained a larger share of such lands than legally ought to have been allotted to him; and he does not therefore seek to recover any specific land now in possession of the defendant, but prays that the partition may be adjusted by taking from defendant a certain quantity out of the land in his

1868. February 28. S. A. No. 297 of 1867.

possession and transferring that quantity to himself. There can, we think, be no doubt that the documents 1, 2, and 5 having been found to be genuine, it follows as a necessary result that from 1846 the state of union between plaintiff and his late brother on the one side, and the defendant on the other side ceased; the defendant then became, and has ever since been, the divided brother of the plaintiff, and this whether or not the family property was then actually divided by metes and bounds. This is, we think, in accordance with the recent judgment of the Privy Council. But we are not now called upon to say whether, if there had been no such division by metes and bounds, and the defendant had up to 1855 (when, as plaintiff alleges, a division by metes and bounds first took place) received his allotted share by taking it out of the produce collected from all the lands of the family in the village, the present suit (framed as it is) would not still be barred, provided the actual division in 1855 gave the defendant only the same share in the lands as he had before received of the produce. How that would be we need not decide, for the finding of the Civil Judge goes much beyond that. He finds that there was in 1846-47 an actual division and separate possession of the lands, " this division consisting in a division of land by ploughs, each taking the lands of ten ploughs respectively, there being twenty ploughs to the village." This is really the arrangement provided by the razinamah with the sole difference that the shares are therein stated in measurements, and that there is to be " a just proportion of the good and bad lands." There was, no doubt, before the Civil Judge evidence which would have justified him in finding that the lands in Kadumbamgudi had not been actually divided, but merely the produce of all the lands divided into equal half shares. But he has elected to credit the evidence as to an actual division, and he states that for this conclusion he relies on the evidence of the defendant when examined as a witness for the plaintiff, on the evidence of two of defendant's witnesses, and on the inference to be drawn from the documents 1, 2 and 5, and the admission of the plaintiff that the property specified in one of those documents has since its date been separately held and enjoyed in accordance therewith. This evidence

no doubt exists; and we are concluded by the finding upon it, though we are very far from suggesting that the conclusion of the Civil Judge derived from it is an unreasonable one. The facts then must be taken to be, that since 1847 the defendant has been divided from plaintiff and his brother; that he then obtained and has since held separately as his share on partition of the lands in this village a certain quantity of land; that the same quantity of land was confirmed to him as his share of the razinamah of 1852; that what was done in 1855 was to adjust the shares so as to make them equal in quality as well as in quantity, and that then perhaps there may have been some interchange of lands, though to what extent does not appear, nor is it material to enquire; and lastly, that this quantity of land is still in the possession of the defendant, and it is by reason of this quantity being in excess of the share to which the defendant is legally entitled that the plaintiff has brought the present suit, seeking to reduce the quantity to the limits of what he alleges to be the defendant's lawful share. These being the facts of the case we are of opinion that the injury of which the plaintiff complains was complete in 1847, and the re-adjustment made in 1855, so as to equalize the shares in respect to quality, could not give him a new starting point, and that consequently his present suit is barred by the Act of Limitations. We therefore reverse the decrees of the Courts below, and dismiss the plaintiff's suit, and the plaintiff must pay the defendant's costs here, and in the Courts below.

Appeal allowed.

Appellate Jurisdiction (a)

Regular Appeal No. 6 *of* 1867.

SUBRA'YA PILLAI........ ....*Appellant.*

SUBRA'YA MUDALI, and 3 others......*Respondents.*

The plaintiff, a resident of Pondicherry, held a bond from one of the defendants (the 2nd) for a certain sum of money. This bond the plaintiff charged the said defendant before the French legal authorities with having fraudulently abstracted from his house in Pondicherry and he obtained the arrest and extradition from British Territory of the 2nd defendant, as also of his brother the 1st defendant. The latter on his way to Pondicherry met the plaintiff, and a settlement of accounts took place. The 5th, 6th, 7th and 8th defendants made themselves liable by executing the bond sued on for the sum found due to the plaintiff, and took indemnity bonds to themselves from the 1st defendant, the consideration being the agreement of the plaintiff to discontinue further proceedings on the criminal charge. The Court at Pondicherry sanctioned the agreement as a compromise by Civil redress, and suspended further proceedings in accordance with the law in force in the settlement.

Held, that the contract was enforceable, the facts of the case not showing the compromise to be in its nature prejudicial as being in contravention of public policy under the Government of British India, or injurious to the good order and interests of society in regard to the administration of public justice.

The English Common Law rule, that contracts for the compounding or suppression of criminal charges for offences of a public nature are illegal and void, has no application to a contract for compounding the prosecution of criminal proceedings for an offence against the Municipal law of a foreign country.

The rule of International law that the law of the place of a contract governs its validity is subject to the qualification that every state may refuse to enforce a contract when it is for the fraudulent evasion of its laws, or is injurious to its public institutions or interests.

1867. *October* 23. *R. A. No.* 6 *of* 1867.

THIS was a Regular Appeal from the Decree of George Ellis, the Civil Judge of Cuddalore, in Original Suit No. 9 of 1864.

Srínivása Cháriyár for the appellant, the plaintiff.

Vencatapathi Ráu and *Parthasárathi Aiyangár* for the 1st respondent, the 5th defendant.

The facts are fully set forth in the following

JUDGMENT :—This is a suit to recover the amount due to the plaintiff (the appellant) on a bond executed by the respondents (the 5th, 6th, 7th and 8th defendants). The

(a) Present: Scotland, C. J. and Collett, J.

only plea which it is material to notice here is that of the 6th, 7th and 8th defendants. They aver that the bond was one of two given at the 1st defendant's request for a balance found to be due by him and his brother the 2nd defendant, in order to pacify the plaintiff in respect of a charge of fraud brought in the French Court at Pondicherry against the 1st defendant, upon which the latter had at the time been arrested under authority from the Court. The 1st, 2nd, 3rd and 4th defendants appear to have been joined in the suit, because the 1st defendant gave two indemnity bonds for the same amounts to the respondents, and the others were his brothers. As against these defendants the Civil Judge held that no liability had been shewn, and that decision is not objected to. As respects the respondents, the dismissal of the suit has been decreed on the ground that the consideration for the bond was proved to be the compromise of a charge of theft, and therefore illegal and void.

The material facts deducible from the recorded oral evidence and the unquestioned official copies of the correspondence between His Excellency the Governor of Pondicherry and the Collector of South Arcot, obtained and put in evidence during the argument of the appeal, appear to be these :—The plaintiff, a resident of Pondicherry, held a bond of the 2nd defendant for Rupees 10,223-7-5 due on transactions in indigo between the plaintiff and the 1st and 2nd defendants. This bond the plaintiff charged the 2nd defendant before the French legal authorities with having in May 1862 fraudulently abstracted from his house in Pondicherry by means of a false key, and thereupon in September of the same year obtained through legal process the 2nd defendant's arrest in, and extradition from, British Territory. In the same month the plaintiff also applied for and obtained the arrest and extradition of the 1st defendant, on the charge apparently of complicity in his brother's offence. On the way to Pondicherry to answer the charge and when at his village (but apparently at the time in British Territory, though this is left somewhat in doubt), the 1st defendant was met by the plaintiff and the respondents, and on a settlement of accounts the

1867. October 23. R. A. No. 6 of 1867.

sum due to the plaintiff was ascertained to be Rupees 19,200, of which the plaintiff waved off Rupees 200. For the balance the respondents made themselves liable by executing the bond sued on and another for Rupees 3,000 and odd, and took from the 1st defendant two indemnity bonds to themselves for the same amounts, the consideration being the agreement of the plaintiff to discontinue further proceedings on the criminal charge. This arrangement was forthwith submitted for the consideration of the Court at Pondicherry and sanctioned as a compromise of the offence by Civil redress, and by its order further proceedings on the charge were suspended, in accordance admittedly with the provisions of the French law in force within the settlement.

On these facts we are of opinion that the decision and decree of the Lower Court are not maintainable; contracts for the compounding or suppression of criminal charges for offences of a public nature are illegal and void by a rule of the common law of England, which rests on the principle that contracts of that kind are manifestly opposed to public policy and mischievous to the interests of the State, and so long as there is no legislative provision recognising such transactions within strictly prescribed limits, the soundness and expediency of the rule seems unquestionable. We think too that, if closely governed by the principle, the rule is fitly and justly applicable to contracts between Natives of this country in perfect consistency with their own peculiar civil laws and customs. Indeed the penal law of the country (Sections 213 and 214 of the Penal Code) makes it a crime to enter into agreements to conceal an offence, or to screen or abstain from proceedings against an offender, subject to an exception which appears to have been framed with reference to the same principle. A contract, therefore, for the compounding or suppression of a crime of a public nature, like that in the present case, committed within the Territory of British India would, we do not doubt, be held invalid on both the grounds of its being contrary to public policy and *malum prohibitum* by legislative enactment.

1867. October 23. R. A. No. 6 of 1867.

But it is clear to us that the Common Law Rule can have no application to a contract for compounding the prosecution of criminal proceedings for an offence against the Municipal law of a Foreign country and committed there, the law of that country permitting such a transaction; and this whether the contract is entered into there or in British Territory. The rule of International law, that the law of the place of a contract governs its validity, is no doubt subject to the qualification that every State may refuse to enforce a contract when it is for the fraudulent evasion of its laws, or injurious to its public institutions or interests. See *Story on the Conflict of Laws, Sections* 244 *to* 259. *Wheaton's Inter: Law,* 179. And the suit in the present case would not be maintainable though the bond was executed in the French Territory, if the facts in evidence brought the transaction of compromise clearly within the principle of the Common Law Rule.

In whichever Territory, then, the contract was entered into, the essential question is substantially the same, namely whether the compromise was in its nature prejudicial, as being in contravention of public policy under the Government of British India, or injurious to the good order and interests of society in regard to the due administration of public justice, or otherwise. And that we are of opinion is not in any degree shewn by the facts of this case. The bond, therefore, not being contrary to our law, or the rule of public policy, is enforceable. Mr. Wheaton, in the note at page 180 of his work, refers to an American decision in the case of *Kentucky* v. *Bassford* which appears to be very much in point. There a contract relating to lotteries which were authorised by the law of Kentucky, but were illegal in New York, was enforced in New York, the Court laying down the qualification that an obligation to carry into effect a foreign law sanctioning what was plainly contrary to morality would not be enforced.

For these reasons our judgment is that the plaintiff is entitled to recover, and the decree of the Civil Court must be reversed, and as it has been admitted all through that the principal sum of 10,000 Rupees remains due, the decree of this Court will be for payment of that sum, and the

1867. October 23. R. A. No. 6 of 1867.

interest at the rate stipulated in the bond, calculated to the date of this decree, and payment of further interest on the amount of the debt and costs at the rate of six per cent. per annum until the whole is discharged. The appellant and respondents will respectively bear his and their own costs in the Court below, but the respondents must pay the appellant's costs in this Court.

Appeal allowed.

Appellate Jurisdiction (a)

Criminal Petition No. 224 of 1867.

KA'DAR RAVUTTAN, and AYANGANA RAVUTTAN.... } *Appellants. (Prisoners.)*

To constitute the offence of false personation under Section 205 of the Penal Code it is not enough to shew the assumption of a fictitious name; it must also appear that the assumed name was used as a means of falsely representing some other individual.

Reg. v. Bhitto Kuhar (1 Indian Jurist 123,) dissented from.

1868. March 9. C. P. No. 224 of 1867.

THIS was a petition against the sentence of F. S. Child, the Session Judge of Tinnevelly, in case No. 155 of the Calendar for 1867. In this case the 1st prisoner was convicted of false personation in a judicial proceeding under Section 205 of the Indian Penal Code, and of giving false evidence under Section 193, and he was sentenced to seven years' rigorous imprisonment. The 2nd prisoner was convicted of abetting the commission of the offence of false personation by the 1st prisoner and was sentenced to three years' rigorous imprisonment.

The prisoners appealed.

Mayne and *Branson* for the prisoners.

The Court delivered the following

JUDGMENT:—The record in this case was called for in order that the Court might determine the objection taken to the validity of the conviction of the 1st prisoner on the first charge and of the 2nd prisoner on the third charge. We are now clearly of opinion that both are bad.

(a) Present: Scotland, C. J. and Collett, J.

To constitute the offence of false personation under Section 205 of the Penal Code, it is not enough to shew the assumption of a fictitious name. It must also, we think, appear that the assumed name was used as a means of falsely representing some other individual. It is not an uncommon thing for men to pass under names not their own for the purpose of disguise, in some instances from blameless and in other instances indifferent or bad motives—"*incog.*" as the disguise is often termed in the former, and "with or under an alias" in the latter instances. But, whatever the motive, the use of an assumed name without more is not a criminal offence. It only becomes a crime when connected by proof with some other act or piece of conduct; and the gist of the offence of false personation under Section 205, we think, is the feigning to be another known person. The whole language of the section clearly imports the acting the part of another person, the actor pretending that he is that person.

1868.
March 9.
C. P. No. 224
of 1867.

There are Sections of the Penal Code under which the false assumption of appearance or character may be an offence, though no individual is meant to be represented, or only an imaginary person. Such are the Sections 140, 170, 171 and 415, but they have no application to the present case, and the last Section is made applicable to personation of an imaginary person by an express enactment.

With reference to the contrary decision of the High Court at Calcutta in *Reg.* v. *Bhitto Kuhar* (1 Indian Jurist 123) we have only to observe, with every respect to the Judges who decided the case, that the reasons reported to have been given by one of the Judges in support of the decision are not satisfactory to our minds.

Then as to the evidence here:—it shews no more than that 1st prisoner used a name different from that by which he was commonly known, and had recently before been examined as a witness in another suit. He no doubt had a purpose, and most probably an improper one, in so acting, but there is nothing in the case to shew that he was personating any other person.

For these reasons the convictions and sentences on the

1868. March 9. C. P. No. 224 of 1867. first and third charges must be quashed, and the 2nd prisoner set at liberty. The conviction of the 1st prisoner on the 2nd charge is supported by the evidence and must be affirmed. But the sentence on that charge is very excessive. Rigorous imprisonment for the term of 2 years we think a sufficiently severe punishment, and the sentence must be accordingly reduced.

Appellate Jurisdiction (a)

Criminal Petition No. 12 *of* 1868.

SUNDARA DASS TEVAN..........................*Petitioner.*

In a charge under Section 498 of the Penal Code, the words of the Section "conceals or detains" must be taken to extend to the enticing or inducing a wife to withhold or conceal herself from her husband, and assisting her to do so, as well as to physical restraint or prevention of her will or action. Depriving the husband of proper control over his wife for the purpose of illicit intercourse is the gist of the offence, and a detention occasioning such deprivation may be brought about simply by the influence of allurements and blandishments.

1868. March 13. C. P. No. 12 of 1868. PETITION against the proceedings of F. S. Child, the Session Judge of Tinnevelly, dated the 27th October 1867, held in Case No. 96 of 1867, on the file of the Deputy Magistrate, upon an appeal filed by the petitioner against the sentence passed in the said case.

Mayne, for the petitioner.

The Court delivered the following

JUDGMENT:—We have considered the depositions on record in this case and are of opinion that there is really no evidence of the accused persons having detained the wife of the complainant for the purpose of illicit intercourse. The conviction, therefore, under Section 498 of the Penal Code, must be set aside.

We are not, however, to be understood as deciding the case on the ground that physical constraint of the wife is an essential of the offence. We are quite of a different opinion. The words of the Section "conceals or detains," may and were, we think, intended to be applied to the

(a) Present: Scotland, C. J. and Ellis, J.

1868.
March 13.
C. P. No. 12 *of* 1868.

enticing or inducing a wife to withhold or conceal herself from her husband, and assisting her to do so as well as to physical restraint or prevention of her will or action. Depriving the husband of his proper control over his wife, for the purpose of illicit intercourse, is the gist of the offence, just as it is of the offence of taking away a wife under the same section (*See Reg.* v. *Kumarasámy*, 2 M. H. C. Rep. 331), and a detention occasioning such deprivation may be brought about simply by the influence of allurements and blandishment.

Here there is no reasonable evidence to show that the woman had not perfect freedom to leave the house, or that any allurement or persuasion was required or used to induce her to remain. There is, however, a difficulty in saying that the statements of the complainant and the 2nd witness are not some evidence of the offence of taking away the woman. But it is very slight evidence, and in our opinion wholly insufficient proof when the other evidence is considered, and therefore does not bring the case within section 426 of the Criminal Procedure Code, which provides against the reversal of a sentence when "in the judgment of the Court the accused person ought on the evidence to have been found guilty of an offence."

The convictions and sentences must be quashed, and the fines levied returned to each of the defendants.

Convictions quashed.

Appellate Jurisdiction (a)

Civil Petition No. 15 *of* 1868.

MUTHA'YAMMA'L guardian of NALLATHAMBI GAUNDAN and MUTHUVIRAPPA GAUNDAN.................... } *Petitioner.*

TIRUMALA GAUNDAN, and another.................... } *Counter Petitioners.*

No appeal lies against an order passed upon an application made before decree, under Section 73 of the Civil Procedure Code, except in case of an appeal from the decree itself, as provided for in Section 363.

In the case reported in 1 M. H. C. Rep. 197, the petition was presented in the course of a Regular appeal then pending in the High Court.

1868. *March* 16. *C. P. No.* 15 *of* 1868.

PETITION against the order of H. D. Cook, the Civil Judge of Coimbatore, dated 9th December 1867.

Mayne and *Ráma Ráu* for the petitioner.

Handley and *Brockman* for the counter petitioners.

The Court delivered the following

JUDGMENT:—This is an appeal from orders made by the Civil Court on applications before decree, under Section 73, by the applicant as guardian of her minor grandsons, to be admitted as parties to suits brought against the father of the minors to enforce mortgages made by him of ancestral property.

The preliminary objection was taken that no appeal lies to this Court against such an order, and we are of opinion that the objection is well founded. The Section under which the application was made vests the discretion in the Court before which the suit is pending and gives no right of appeal. The general Section applicable to appeals from orders made before decree is Section 363, and that expressly provides that no appeal shall lie from such order except in case of an appeal from the decree itself; Section 23 of the Amending Act XXIII of 1861 (which was substituted for Section 332 of the Code giving the right of appeal

(a) Present: Scotland, C. J. and Collett, J.

against decrees) is another general Section relating to appeals, but that is in terms confined to appeals from decrees, and Section 363 is not one of the Sections repealed in the first Section of Act XXIII of 1861. 1868. *March* 16. *C. P. No.* 15 *of* 1868.

In the case to which we were referred by Mr. Mayne, reported in 1 M. H. C. Rep. 197, the petition was, as we have ascertained by referring to the papers on record, presented in the course of a regular appeal then pending in this Court, and our present decision is therefore not in any way in conflict with that case.

This application must therefore be dismissed.

Petition dismissed.

Appellate Jurisdiction (a)

Regular Appeal No. 106 *of* 1867.

HUSSAIN BEEBEE....................... *Appellant.*

HUSSAIN SHERIF, and another... ...*Respondents.*

According to Muhammadan Law a women may manage the temporal affairs of a mosque, but not the spiritual affairs connected with it, the management of the latter requiring peculiar personal qualifications.

THIS was a Regular Appeal from the decree of E. B. Foord, the Civil Judge of Berhampore, in Original Suit No. 10 of 1867. The plaintiff in this suit claimed the joint right with the defendants to the office of priest of the Shekh Fareed Shukkurganj mosque situated at Itchapore, which she asserted was enjoyed by her late husband Syed Kassim, and to recover from them a third share of the lands of the village of Telukuncha, and a fourth of the lands of the village of Mashagapúram, which are attached to the aforesaid office, the former of which she alleged were usurped by the defendants during the life time, and the latter after the death of her late husband. The defendants denied that the plaintiff's late husband had any right to the office in question, and pleaded that although he managed to get possession of the lands in question during their (defend- 1868. *March* 23. *R. A. No.* 106 *of* 1867.

(a) Present: Bittleston and Ellis, JJ.

1868. March 23. R. A. No. 106 of 1867.

ants') minority, he executed a document (marked No. 1), in their favor on the 12th November 1862, by which the said lands were restored to their possession. Defendants further pleaded that plaintiff had no right to claim lands granted for the endowment of a religious office.

The Civil Judge dismissed the suit.

The plaintiff appealed.

Mayne for the appellant, the plaintiff.

Branson for the respondents, the defendants.

The Court delivered the following

JUDGMENT:—The plaintiff in this suit seeks to recover possession from the defendants of certain lands forming part of the endowment of a mosque ; and she also prays that the defendants may be prohibited from interfering with her turn of performing the púja service therein.

Her claim is based upon the allegation that her late husband, Syed Kassim, was, jointly with the defendants, possessed of and entitled to the muzuwari right, which is described in the plaint as the right "to make púja" and in the defendants' written statement as "the power of conducting all the affairs, such as reading Korán, distributing rice to the fakirs, performing festivals, &c.," in the mosque ; and the plaintiff describes herself as muzuwari or pújari by profession, as, no doubt, her husband was and the defendants are.

It is clear, therefore, to us that the Civil Judge correctly describes the suit in his judgment when he says that "the plaintiff in this suit claims the joint right with the defendants to the office of priest" of this mosque, and that it is only by virtue of her alleged right to hold this religious office that she sets up any title to the lands in question.

Mr. Mayne, on behalf of the appellant, admitted that he was unable to find any authority in Muhammadan Law for saying that a woman was competent to hold any religious office in connection with a mosque ; and it appears to us that the authorities are clear the other way.

In the case of *Doe* d. *Janu Beebee* v. *Abdoollah Barbu* (Fulton 345), it was held that a female might act as Mutawalle or superintendent or trustee of property appropriated to charitable uses, but then the distinction is pointed out between a Mutawalle and the holder of a religious office as a Guddee nisheen. See p. 359 where Ryan C. J. says—" It is equally clear and without dispute that a female may act as Mutawalle. It is hardly necessary to cite authorities for this position. The note in Mr. McNaghten's Book, p. 343, points out the distinction between the Guddee nisheen (or superior of an endowment) and Mutawalle, and adds the office of trustee, *i. e.*, Mutawalle, may be held by a woman and the duties may be discharged by proxy."

1868.
March 23.
R. A. No. 106
of 1867.

In the note above referred to Mr. McNaghten explains that the Guddee nisheen has charge of the spiritual, the Mutawalle of the temporal, affairs of the endowment; and that the latter office may be held by a woman, and the duties may be discharged by proxy; but that the former requiring peculiar personal qualifications may not.—Cases 3 and 4 amongst the precedents of endowments, at pp. 329 and 331: and a case at p. 22 of 6 S. D. A. Bengal R. illustrate this distinction. In Sadagopah Charlu's Manual, p. 31(*a*) (quoting Elb: 63) the same distinction is stated.

Upon this ground alone it seems to us that the plaintiff's claim fails, but considering what is the admitted relationship of the parties, that the defendants are the only male heirs of the founder, that the plaintiff's late husband had no title to the office except such as he derived through his 1st wife and her sister under the document marked C. (a document, as it seems to us, of very questionable validity), we are by no means prepared to say that there is any such improbability in the defendants' case, respecting the execution of document No. 1, as would warrant us in holding that it was not genuine in opposition to the clear conviction of the Civil Judge on the subject. The decree therefore must be affirmed with costs.

Appeal dismissed.

(*a*) P. 47, Second Edition.

Appellate Jurisdiction (a)

Special Appeal No. 594 *of* 1867.

YERRABALU VIRARA'GAVA REDDI...*Special Appellant,*
(*Plaintiff.*)

ABDUL KHA'DIR SAHIB and another.. *Special Respondents,*
(*1st & 2nd Defendants.*)

The plaintiff sued on a mortgage bond executed by the 1st defendant. The 2nd defendant, who claimed the property under a mortgage from the 1st defendant, was admitted a defendant on his own application ; but, afterwards, excluded from the suit. Before this was done he had incurred certain costs which, by the Munsif's decree, he was ordered to bear himself. Upon appeal by the 1st defendant the Civil Judge found that the mortgage bond sued upon was not proved, dismissed the suit, and ordered the plaintiff to pay all costs, those of the 2nd defendant included.

Held, that under Sec. 337 of the Civil Procedure Code it was competent to the Civil Judge so to modify the Munsif's decree, as the main ground of the whole decision viz., the validity of the mortgage bond, affected all the defendants in common, and the appeal of the 1st defendant and the decision of the Appellate Court had reference to that common ground.

1868. *March* 23. *S. A. No.* 594 *of* 1867.

THIS was a Special Appeal from the decision of J. R. Cockerell, the Civil Judge of Nellore, in Regular Appeal No. 79 of 1866, reversing the decree of the Court of the District Munsif of Nellore in Original suit No. 61 of 1865.

Rama Ráu for the special appellant, the plaintiff.

Rungaiya Náyudu for the special respondent, the first defendant.

The facts are fully set forth in the following

JUDGMENT:—The plaintiff sued on a mortgage bond executed by the first defendant. The second defendant, who claimed the property under a mortgage from the first defendant, was admitted as a defendant on his own application, but, afterwards, the second defendant's claim being satisfied by the first defendant, he withdrew, or was excluded from the suit. Before this was done, he had incurred costs to the extent of Rupees 17-6-4, and by the Munsif's decree, which directed the first defendant to pay to the

(a) Present: Bittleston and Ellis, JJ.

plaintiff the sum sued for and his costs, the second defendant was ordered to bear his own costs.

Upon appeal by the first defendant alone, the Civil Judge found that the mortgage bond sued upon was not proved, dismissed the suit, and ordered the plaintiff to pay not only the appellant's costs, but also the said sum of 17-6-4, to the second defendant.

Upon the argument before us, the only point made was that the Civil Judge had no jurisdiction to order the plaintiff to pay the costs of the second defendant, who had not appealed. If he had jurisdiction, the order which he made was certainly not such a violation of any general principle regulating the discretion of the Courts in disposing of the question of costs as would warrant us in interfering with it. The plaintiff's suit against the first defendant affected property in which the second defendant was interested as mortgagee, and when it was decided that the plaintiff's suit was an unfounded one, it was reasonable that the costs incurred by the second defendant in that suit should be paid by the plaintiff, though before the suit was disposed of the second defendant's claim had been discharged by the first defendant, and he had ceased to have any further interest in the matter.

Then, was the Judge precluded from making that order because the second defendant did not appeal? He was not, of course, if Section 337 of the Code was applicable to the case; but it was argued that that Section did not apply, as the decision of the Lower Court did not proceed on a ground common to all the defendants. No doubt so much of the decision as ordered the second defendant to bear his own costs did not wholly proceed on any common ground: but the main ground of the whole decision, viz. the validity of the mortgage bond, affected all the defendants in common, and the appeal of the first defendant, and the decision of the Appellate Court, had reference to that common ground. If the Lower Court had decided, as the Appellate Court did, that the plaintiff's mortgage bond was not proved, the decision as to the second defendant's costs would, probably, have been different. At all events, the

1868. March 23. S. A. No. 594 of 1867. question then would have been whether the plaintiff or second defendant should bear those costs—not whether the first defendant or the second defendant should bear them, and so in part, the decision as to costs did proceed on a ground common to the second and other defendants.

We have no doubt that it was competent to the Civil Judge, under the circumstances, to modify the decree of the Lower Court by relieving the second defendant of, and charging the plaintiff with, costs which he, the second defendant, had reasonably incurred for the protection of his own interests, in a suit which the plaintiff had wrongfully brought. This appeal must be dismissed with costs.

Appeal dismissed.

Appellate Jurisdiction (a)

Special Appeal No. 407 *of* 1867.

TIMMAPPA HEGGADE..............*Special Appellant.*

MAHALINGA HEGGADE..........*Special Respondent.*

The Pattam, or office of dignity in a family governed by the Aliya Santána law, is indivisible, and, whether the family be divided or not, the Pattam, no special arrangement having been made about it, descends to the eldest male of the surviving members of the family.

The passage set out in a note to the case of *Munda Chetti v Timmaju Hensu* (1 M. H. C. Reps. 380) is not a correct interpretation of the original Canarese text of Bhutála Pandiya's work.

1868. April 3. S. A. No. 407 of 1867. THIS was a special appeal against the decree of Srinivása Ráu, the Principal Sadr Amín of Mangalore, in Regular Appeal No. 575 of 1865, reversing the decree of the Court of the District Munsif of Udipi, in Original Suit No. 379 of 1863.

Sunjiva Ráu for the special appellant, the plaintiff.

Srinivása Chárydr for the special respondent, the 1st defendant.

The facts sufficiently appear in the following

JUDGMENT:—This is an appeal from the decree of the Principal Sadr Amin's Court of Mangalore, dismissing the suit. The plaintiff and the defendants are members of

(a) Present: Scotland, C. J. and Ellis, J.

1868. April 3. S. A. No. 407 of 1867.

divided branches of a family which is governed by the Aliyasantána system of law, and the object of the suit is to establish the right of the plaintiff to be installed in the "Pattam" or office of dignity in the family designated "Nagur Hegade," to which certain advantages and highly prised customary honors are attached.

BIBL. CODR. COLL. OMN. ANIM. OXON.

The family, it appears, are descendants of one Virama through two of her daughters, named Subbi and Manappu. The 1st defendant is the senior male descendant of Subbi, the elder of the sisters; but he is younger than the plaintiff, who is a descendant of Manappu and the senior of the whole family. In 1826 the two branches of the family became divided in interest, and have continued separate from that time. No arrangement, however, was then made in regard to the Pattam, but on one of the two occasions of succession to the office since the division, the successor seems to have been the eldest member of Subbi's branch, though there was alive at the time an older member of Maanppu's branch. The Principal Sadr Amín, differing from the District Munsif, has decided against the plaintiff on the ground that the Pattam belongs to the eldest member of the senior branch and not the eldest member of the whole family. The question for our determination is, whether that decision rests on an unsound construction of the Aliya Santàna Law of Inheritance.

The Principal Sadr Amin has proceeded on the rule of succession as given by Mr. Anderson, a former Civil Judge of Mangalore, in an appeal before him (No. 82 of 1843), and which is set out in a note to the case in this Court of *Munda Chetti* v. *Timmaju Hensu* (1 M. H. C. Rep. 380.) If that is a correct interpretation of the original Canarese text of Bhutála Pandiya's work, it clearly supports the decree of the Lower Appellate Court. The appellant contends that it is an incorrect rendering of the original, and that the decision of the District Munsif is in accordance with its true import. The passage of Mr. Anderson's Judgment which is relied upon was certainly acted upon by the judges who decided the case of *Munda Chetti* v. *Timmaju Hensu*; but no doubt was raised in the case about its accuracy, and the point determined was that the

1868. April 3. S. A. No. 407 of 1867.

law did not allow compulsory division. It cannot therefore be said that the rule, as therein laid down, has received judicial sanction on the point raised in this case, and its substantial accuracy as respects non-division is not questioned.

No complete English translation of the text of Bhutála Pandiya is, we believe, extant, and the vernacular edition produced in the case is that published at the German Mission Press in Mangalore.

Whether this is a perfectly accurate transcript of the original we have not been able by means of collation to ascertain with certainty. But it is generally accepted and used as a book of reference, and although the Court has given some time for inquiry on this point, no different text has been produced. The Canarese Translator of the High Court has furnished to the Court a carefully prepared translation of the particular portions of the text, which is further certified as correct by one of the interpreters. The Vakil of the respondent, who is also acquainted with Canarese, is unable to dispute its correctness. It is as follows :—

" The children of the senior and junior maternal aunts, " the eldest female, the eldest male, shall stand (entitled) " only to Ali* Uli, but the children of the elder and younger " (branch) can have no reason to enter into a division. " The other living persons shall act in union. In this if " misunderstandings arise between the elder and younger " sisters, the elder shall provide the younger with a house " and household articles and have the management, herself " having a right (or claim) to Urisiri.† Thus Bhutála Pandi- " yar made a rule and prohibited divisions of property. " Bhutála Pandiyar wrote, and added the rule that to the " Pattapatti (dignity) wherever it exists, the Ali Uli man " (the surviving heir above alluded to) shall alone be " entitled and not the other santana offspring, who will be " entitled where the Uli (heir) is dead." This differs materially from the version accepted by Mr. Anderson. So

* " Ali Uli means death, survivorship, and obtaining property, (see page 11, lines 7 and 8, also line 20, page 13 of Bhutála Pandiyar's Aliyasantána Rules). Hence heirship."

† " Uri means fire, Siri means prosperity. By the use of this " compound is meant a participation and liability in respect of all " that is good and bad."

1868. April 3
S. A. No. 407 of 1868.

interpreted, the rule does not, we think, make any distinction in favor of the senior sister's branch, but treats the descendants of both sisters as one united family and the right to the Yejamanship and to hold the Pattapatti or office of dignity as belonging to the eldest member. This strikes us as more consistent with the prohibition against the division of the family which it is the main purpose of the rule to declare, and which, in regard to compulsory division, this Court has decided to be the inflexible law of the Aliyasantána system of inheritance. The distinction between one branch and the other as respects an individual right attached to seniority in years, seems hardly reconcilable with the continuing status of non-division, and the equal community of interest of the branches. Probably if no division had been come to in this case beside the law, the right of the plaintiff would not have been questioned. Certainly the division seems the one circumstance which gives an appearance of support to the claim of permanent right on the part of the descendants of the senior sister.

We are of opinion, however, that the division does not really affect the question. The Pattam is indivisible and, no arrangement having been made relating to it, the right of succession remains, we think, just as if there had been no division of family property. Something was said in argument about the evidentiary effect of the former succession of a member of the senior branch in preference to an elder member of the junior branch. We have no satisfactory information as to the particular circumstances attending the single occurrence and by itself it can be given no effect.

Considering the import of the original text to be accurately given in the translation furnished by the officer of the Court, we are of opinion that, according to the true construction of the rule of law, the eldest male of the surviving descendants of Virama is entitled to the pattam of the family with its customary benefit and dignities.

The decree of the Lower Appellate Court must therefore be reversed and the appellant declared to be the rightful successor. The respondent (the 1st defendant) must pay the appellant's costs in this and both the Lower Courts.

Appeal allowed.

Appellate Jurisdiction (a)

Miscellaneous Special Appeal No. 8 *of* 1868.

VIRASAMY MUDA'LI..........................*Special Appellant.*

MANOMMANY AMMA'L.............. ...*Special Respondent.*

Miscellaneous Special Appeal No. 70 *of* 1868.

VENKATA BALAKRISHNA CHETTI and another...*Spl. Appelts.*

SIVJI VIJIARAGUNADHA VALAJI KRISHNA GOPALER..*Spl. Respt.*

A Special Appeal lies to the High Court from orders passed by Lower Appellate Courts on application for execution of decrees.

The day on which an application for execution is made is not to be reckoned in computing the three years alluded to in Section 19, Act XIV of 1859.

An order dismissing an appeal for default under Section 346 of the Civil Procedure Code is not a new decree from the date of which the period of limitation begins to run anew.

The appearance of the person in whose favour a judgment is given, as respondent on an appeal, is not an act done for the purpose of keeping the judgment in force within the meaning of Section 19, Act XIV of 1859.

1868. *April* 3. *M. P. Nos.* 8 *and* 70 *of* 1867.

THESE were Special Appeals from orders passed by the Civil Courts of Chingleput and Tranquebar (as Appellate Courts), on applications for the execution of decrees.

Mayne for Petitioner in Civil Petition 8 of 1868.

Rangiah Nayudu for Counter Petitioner in do.

Miller for Petitioner in Civil Petition 70 of 1868.

In these petitions the Court delivered the following

JUDGMENT :—The first question in both these cases is whether a special appeal lies to this Court from an order passed by a Civil Judge on appeal from an order of a Lower Court made on application for execution of a decree.

No such appeal has been allowed in this Court, at all events since the date of the proceedings passed by the late Sadr Court on the 12th April 1860, which have been published in the Rules of Practice of this Court; but doubts having been entertained by several of the Judges as to the

(a) Present: Scotland, C. J. and Bittleston and Collett, JJ.

correctness of the practice which has thus been established, and the High Court of Calcutta having held that such an appeal does lie, it was thought desirable that the question should be re-considered; and it having been fully argued before us we are prepared now to state the conclusion at which we have arrived. That conclusion is that we concur with the High Court at Calcutta in thinking that a special appeal does lie in these cases.

1868. *April* 8. *M. P. Nos.* 8 *and* 70 *of* 1868.

The question depends upon the proper construction of Section 372 of the Civil Procedure Code, for that is the only Section which gives a special appeal; and of course without an enactment of the legislature it cannot exist.

That section gives a special appeal from all "*decisions* passed in *regular* appeal by the Courts subordinate to the Sadr Court." The words themselves are large enough according to their ordinary meaning to include the case in question; for a Civil Judge's order made on appeal from an order of a Lower Court relating to the execution of a decree embodies his "*decision*" on the matter, and the appeal is "*regular*" if it be brought and prosecuted according to the rules by law established.

But the question really is whether the words "*decisions* passed in *regular* appeal" have acquired in the course of Indian Legislation on the subject a more limited meaning, and whether they must be understood in the Civil Procedure Code as applicable only to decrees passed by an Appellate Court upon appeal from a decree of a Court of First Instance in an original suit.

In the earlier Madras Regulations relating to appeals (4 of 1802, Section 12, and 5 of 1802, Section 10), we do not find any provision for special appeals; which appear to be first mentioned in Regulation VII of 1809, Sections 26 and 29. But there are clauses relating to summary appeals which are also repeated in later enactments.

At all events as early as 1816, in Regulation XV of that year, we meet with very nearly the same terms as are used in the Civil Procedure Code; in Section 3, the cases in which a special appeal will lie are specified; and

1868. April 8. M. P. Nos. 8 and 70 of 1868.

in Section 4 the language is that a party dissatisfied with " a *Judgment* on a regular appeal" and " desirous of a second or special appeal" may present his petition; and then the enactment goes on to provide that if it be a proper case, " the Court will admit the special appeal and proceed to investigate the *suit*."

In Section 5 of that Regulation provision is also made for a summary appeal to the Sadr Court from " the orders or decrees of the Provincial Courts, in the case of their refusing to admit either an original suit or an appeal *regularly cognisable* by them," or in case of their dismissing such suit or appeal without investigating the merits.

The inference which may, we think, properly be drawn from this Regulation is, that at that time the special appeal was only given from such "*judgments*" as were passed upon appeal from *decrees* in original suits; but that the term " *regular* appeal" was adopted merely in contradistinction to the term special appeal. The special appeal is the appeal on certain special grounds and is a second appeal. The regular appeal is an appeal in which any ground of objection is open to the appellant; it is the first appeal and applies generally to the whole decision. It would be more appropriately called a general than a regular appeal.

Act III of 1843 for amending the rules of special appeals has the very same words as the Civil Procedure Code. It gives the special appeal from all decisions passed on regular appeals in the Civil Courts; but there is nothing certainly in that Act to indicate any intention of the Legislature at that time to extend the right of special appeal to any other case than that of decrees in suits.

It is to be observed that throughout this Legislation, there is no provision at all respecting any appeal from orders made in the course of a suit, or from orders made in execution of decrees, excepting only the clauses as to summary appeals to which reference has been made.

But in Act VII of 1843, which abolished the Provincial Courts, in this Presidency, there is a Section (14)

relating to the execution of the decrees of the Zillah Courts and of the Sadr Court by the Subordinate Judges and Principal Sadr Amíns upon a reference to them, which has this *proviso.* "Provided that an appeal shall lie from any *order* passed by a Subordinate Judge or Principal Sadr Amín, under such reference to the Zillah Court in the first instance, *and, secondly, a special appeal to the Sadr Addlat.*"

And in Clauses 8 and 9 of that Act which relate to appeals to the Zillah Courts and to the Sadr Court, the words used are in the former case, "from all decrees or *orders* of Subordinate Civil Courts, &c., and of Sadr Amíns and District Munsifs in cases in which appeals are now allowable," and in the latter "appeals regular and summary from decisions and orders of the Zillah Courts." It is clear, therefore, that a special appeal against an order passed in execution of a decree was a proceeding known to the law before the passing of the Code; and we will now return to a consideration of the Code itself, upon the construction of which the determination of the question depends. Now the Code has special provisions relating to appeals from orders. It expressly gives *an* appeal from orders rejecting plaints (Section 36); from orders for arrest before judgment (Section 76); from orders for attachment of property before judgment (Section 85); from orders for injunctions (Section 94); and in other cases (as under Section 119) prior to decree.

Then there is a general provision (Section 363) (which must of course be qualified by excepting the specific cases in which an appeal is expressly given) in these terms;— "No appeal shall lie from any order passed in the course of a suit and relating thereto prior to decree; but if the decree be appealed against, any error, defect, or irregularity in any such order affecting the merits of the case or the jurisdiction of the Court may be set forth as a ground of objection in the memorandum of appeal."

The effect of this Section is that if an appeal be brought against a decree and one ground of objection be a substantial error or defect in passing an order affecting the merits, that ground of objection may be taken before a second

1868. April 8. M. P. Nos. 8 and 70 of 1868.

Court on special appeal. Is it probable then that the Legislature intended to make the decision of the first Appellate Court *final* with respect to the orders from which an appeal is expressly given? Take the case of an order rejecting a plaint on the ground that the plaintiff has no cause of action, or that his suit is barred by the law of limitation; the decision in such a case concludes the plaintiff wholly and finally. Seeing what the Code provides in other cases, can it be supposed that the intention was to limit him to one appeal?

Then, as to orders passed after decree, Section 354 says, "No appeal shall lie from any order passed after decree and relating to execution except as is hereinbefore expressly provided."

One previous express provision is contained in Section 283, which enacted that all questions regarding the amount of any mesne profits which by the terms of the decree may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest which may be payable in respect of the subject-matter of a suit between the date of the institution of the suit and the execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, shall be determined by order of the Court executing the decree and not by separate suit and *the order passed by the Court shall be open to appeal.*

This Section has been repealed by Act XXIII of 1861 and Section 11 of that Act substituted for it. No doubt Section 11 is now to be read as part of the Code; but as regards the question under discussion the new Section makes no difference; it only increases the importance of the question by inserting the words "and any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree," and making all such questions determinable in like manner and the determination subject to the like appeal.

Now here again take the case of an order relating to mesne profits, reserved for adjustment in execution of the

decree. If the question had been disposed of in and by the decree, and the award of refusal of mesne profits was complained of as contrary to law or usage, or as affected on the merits by some error of procedure, the complainant would clearly be entitled to a second or special appeal as well as to a first, or general, or regular appeal. Could the Legislature have intended that, if the very same question was determined by an order in execution, the party aggrieved should be tied down to the first appeal? It would, we think, be strange if the Legislature had so said.

There is only one other general Section (366) applicable to all appeals from orders. It provides that *when an appeal* from any order is allowed, the period for preferring the appeal and the procedure thereon shall be in all respects the same as in an appeal from a decree.

If the language of the subsequent special appeal clause (372) had been such as to exclude from its operation any orders other than decrees, this 366th Section could not, we think, have been construed so as to control the 372nd Section, but when we find (as stated at the outset) that the words used in the latter Section are large enough to include special appeals from orders other than decrees, then the 366th Section operates to make the procedure the same; and gets rid of a difficulty arising from the language of Section 373, which requires an application for admission of a special appeal to be accompanied by copies of the judgments and decrees. At all events the introduction of those words in Section 373 appears to us an insufficient ground for narrowing the construction of Section 372, when the whole scheme of the Act seems to us to lead irresistibly to the inference that the Legislature intended to place all appealable orders on the same footing as decrees with respect to the right of appeal.

There is nothing in the amending Act (XXIII of 1861) at all at variance with this view; but it is rather strengthened than otherwise by Section 27 of that Act, which, in certain suits, prohibits a special appeal "from any *decision* or *order* passed on regular appeal."

1868. April 8. M. P. Nos. 8 and 70 of 1868.

The 35th Section of Act XXIII of 1861 is the only other Section which has any bearing on the question. It authorises the Sadr Court to call for the record of any case decided on appeal by a Subordinate Court " in which no *further* appeal shall lie to the Sadr Court," from which words it might be inferred that there are cases in which an appeal would lie to the Subordinate Court only, but then the Section itself applies only to cases in which the Subordinate Court in hearing the appeal has exercised a jurisdiction not vested in it by law. The object is to provide for cases in which a Subordinate Court has assumed an appellate jurisdiction, which did not belong to it, and in which (the matter not being appealable at all) there could be no further appeal to the Sadr Court. The language is not very happy, and in the substituted Section in the proposed new Code which was sometime ago before the Legislative Council, we observe that the word " further" is omitted. We were referred to a decision of the late Sadr Court of Agra, which is later than, and opposed to, that of the High Court of Calcutta, and shews that Judges of experience even after reading the judgment of the High Court of Calcutta, may arrive at a different conclusion upon this question. We must, however, form our own opinion upon the proper construction of the Code ; and after carefully weighing all the provisions which seem to us to throw any light on the subject, we are led to the conviction that orders appealable under the Code are, like decrees, subject to a special as well as a general appeal.

It remains therefore for us to dispose of these special appeals on the grounds applicable to each.

In Special Appeal 8 of 1868, the application for execution was rejected both by the District Munsif and the Civil Judge on the ground that it was barred by the law of limitation.

The application for execution was made on the 1st December 1866 ; and if (as is stated in the present memorandum of special appeal) a decree confirming the decree of the Lower Appellate Court had been passed by this Court on the 1st December 1863, we should have considered that

the application for execution was made in time. Assuming the case to be governed by Section 20, and not by Section 19 of the Limitation Act, the Court is prohibited from issuing execution " unless some proceedings shall have been " taken to enforce such judgment, decree, or order, or to " keep the same in force, within 3 years next preceding the " application for such execution."

This language is of course inaccurate, as applied to the case of an application for execution within the first period of 3 years from the passing of the decree, because the obvious meaning is that the date of the decree itself is to be the first starting point, from which the period of 3 years is to be reckoned. In that case, therefore, the decree must have been passed within 3 years next preceding the application and the effect of the words "next preceding the application is, in our opinion, to exclude the day on which the application is made. Applying that rule to the present case the 1st December 1866, the day of the application is excluded and 3 years next preceding must therefore include the 1st December 1863, on which day the decree was said to have been passed.

It appears however that, in fact, there was no decree of affirmance passed by this Court on 1st December 1863. But there was an order dismissing the appeal for want of prosecution and giving costs to the respondent who appeared by vakil to oppose the special appeal.

Now an order dismissing an appeal for default under Section 346 of the Civil Procedure Code, is not, as it appears to us, a new decree, from the date of which the period of limitation would begin to run anew, and in this opinion we are confirmed by the decision of a full bench in the High Court of Calcutta in case 583 of 1866 decided on 31st May 1867 (7 Cal. W. R. 521, Civil Rulings.)

In this case, therefore, the decree to be enforced was that of the Civil Judge reversing the original decree, and as that decree was passed on the 22nd September 1862, the application for execution, made 1st December 1866, would be clearly out of time, unless the appearance of the special respondent by vakil on 1st December 1863, was a

1868. April 8. M. P. Nos. 8 and 70 of 1868.

proceeding to enforce or keep in force the decree of the Lower Appellate Court. In the case already referred to, the High Court of Calcutta has held that it is so saying "if, upon the application for review or the petition of appeal, "the person in whose favour the original judgment was "given, appears in person or by vakil (whether voluntarily "or upon service of notice) to oppose the application, files "a vakalatnáma, or does anything for the purpose of pre-"venting the Appellate Court or the Court of Review from "setting the judgment aside, we think that within the "fair interpretation of the words, such act, being an act of "the person in whose favor the judgment has been given "for the purpose of preventing it from being set aside, is an "act done for the purpose of keeping the judgment in "force." We are unable to concur in this view. The Section requires that some proceeding shall have been taken within 3 years to enforce the decree or to keep the same in force, and bearing in mind that an appeal does not of itself operate as a stay of execution, and that, pending an appeal, the decree-holder is at liberty to take any proceedings which the law allows, for enforcing or keeping in force his decree, we think that his merely resisting an application to set aside the decree cannot be regarded as such a proceeding. It seems to us that the proceeding intended by the Section is a proceeding in which the decree-holder is the actor, and a proceeding taken *boná fide* for the purpose of obtaining execution or of preventing the effect of lapse of time. In the present case, so much of the application to the Lower Courts as related to the execution of the decree passed in Regular Appeal in September 1862, was properly rejected as barred by the law of limitation; but, as regards the order of this Court for payment of the respondent's costs, the application for execution was within the 3 years; and to that extent, the decisions of the Lower Courts must be reversed; each party should bear his own costs of this appeal. In Special Appeal 70 of 1868, the facts were that the plaintiff, a Zemindar, brought the suit for possession of a village, and under the decrees of the Lower Courts obtained possession, pending an appeal by the 6th defendant to this Court. In this Court, the decree of the Lower Courts was reversed, and upon appeal to the Privy Council the

decree of this Court was affirmed. In the decree of the Privy Council, no direction was given as to mesne profits: but the 6th defendant, having been put in possession of the village, applied to the Principal Sadr Amín for an award of mesne profits amounting to 92,000 Rupees for the nine years from 1856 to 1864, during which the plaintiff had been in possession, under the reversed decrees. The Principal Sadr Amín upon this application awarded to the 6th defendant 60,000 and odd Rupees, and from this decision the plaintiff appealed to the Civil Judge, who reduced the amount to about Rupees 2,000.

The 6th defendant now appeals specially on the ground of absence of jurisdiction in both the Lower Courts.

The objection to the jurisdiction is now made by the very same person, whose application set the Original Court in motion, and who did not object to the jurisdiction of the Lower Appellate Court; but it is, we think, unnecessary to say in this case whether under those circumstances the objection is or is not open to the special appellant; because upon a consideration of Section 283 of the Civil Procedure Code and Section 11 of the amending Act, which has been substituted for it, we are of opinion that the Lower Courts had jurisdiction. The words of both Sections are large enough to include this case; they are, so far as they apply to this case, "that all questions regarding the amount of any mesne profits or interest which may be payable in respect of the subject-matter of a suit, between the date of the institution of the suit and execution of the decree, shall be determined by order of the Court executing the decree and not by separate suit." This Section, therefore, is not limited in terms to mesne profits payable to the plaintiff: and where, as in this case, a defendant is turned out of possession in the course of a suit, by virtue of the decree of a Lower Court, and is kept out of possession until that decree has been reversed by the Appellate Court, it seems to us that justice requires that the Court executing the decree of the Appellate Court, which is the operative decree in the suit, should not only restore to the defendant his former possession, but give him the mesne profits for the period

1868. April 8. M. P. Nos. 8 & 70 of 1867.

during which he has been wrongfully kept out of possession; otherwise the reversed decree has an operation which according to the decree of the Appellate Court it ought not to have; and a successful defendant is by means of the suit deprived of the possession of his property for a time and left to obtain redress in another suit, in which he must appear as plaintiff instead of defendant. In truth the decree of the Appellate Court, even though no express mention of mesne profits be made in it, cannot be said to be effectually executed unless the defendant be restored as nearly as possible to the position in which he stood when the suit was instituted. Section 362 of the Code requires that application for execution of the decree of an Appellate Court shall be made to the Court which passed the first decree in the suit, and shall be executed by that Court in the manner and according to the rules thereinbefore contained for the execution of original decrees; and it is clear therefore that Section 283 of the Code formerly, and now Section 11 of the amending Act, is as applicable to the execution of the decree of the Appellate Court as of the original decree.

The decree of the Appellate Court may be in its terms simply a reversal of the original decree; but if, under the original decree, one of the parties has been turned out of possession and the other put into possession, then the execution of the decree of the Appellate Court certainly requires the restoration of the possession, and, as connected with that restoration, a return of the profits received during the time the wrongful possession lasted.

We find nothing in the Code at variance with this view, and the consequence is, that the decision of the Civil Judge must be affirmed with costs; for on special appeal we cannot, of course, enter upon a consideration of the evidence as to the amount of mesne profits.

Appellate Jurisdiction (a)

Referred Case No. 9 *of* 1868.

SIVA RA'MA PILLAI..........................*Plaintiff.*

TURNBULL......................................*Defendant.*

Clause 2, Sec. I of Act XIV of 1859 applies only to suits for wages brought by a servant against the person liable as the master in whose service he had been employed, and the section does not apply to a suit brought by one Government servant against another for the recovery of a sum of public money received by the defendant as a disbursement on account of the wages of the plaintiff, to whom the defendant was legally bound to pay it over.

CASE referred for the opinion of the High Court by J. R. Daniel, the Judge of the Court of Small Causes at Madura.

1868. *April* 22. *R. C. No.* 9 *of* 1868.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—From the case as amended we understand the facts to be that the plaintiff held his post subordinate to the defendant, not under an independent contract of service with the defendant individually as principal, but by the official appointment of the defendant or another superior officer of the Forest Department on behalf of the Government. That the plaintiff's duties were those of a Head Watchman or Peon: and that the suit was for an amount of public money actually received by the defendant as a disbursement on acount of the plaintiff's wages.

On those facts we are of opinion that Clause 2, Section I of the Limitation Act is not applicable to the suit; not however on the ground that the plaintiff was not of either of the classes designated in the Clause, for the designation "servants" relates to persons whose personal services are employed in capacities similar to those of unskilled laborers, which we think was clearly the position of the plaintiff, and the Act makes no distinction between "servants, artizans and laborers" employed in the public service and those in any other employment.

Our opinion rests on the ground that the provision in the Clause was intended to apply only to suits for wages

(a) Present: Scotland, C. J. and Ellis, J.

1868. April 22. R. C. No. 9 of 1868.

brought by a servant against the person liable as the master in whose service he had been employed, and the present is not such a suit. The plaintiff's cause of action is the withholding of the money which the defendant had received from the plaintiff's employers, the Government, for the purpose of discharging the wages due, and which he was thereupon legally and justly bound to pay over to the plaintiff. The suit, therefore, is to enforce the implied undertaking to pay over the money to the plaintiff which arose on the receipt of the money by the defendant. On this ground we give our opinion that the suit is not barred by Clause 2, Section I of Act XIV of 1859.

Appellate Jurisdiction (a)

Regular Appeal No. 75 *of* 1867.

GULAM HUSSAIN SAIB SAIYAD..................*Appellant.*

AJI AJAM TADALLAH SAIB KURAISHI......*Respondent.*

Regular Appeal No. 25 *of* 1868.

AJI AJAM TADALLAH SAIB KURAISHI..... *Appellant.*

GULAM HUSSAIN SAIB SAIYAD...................*Respondent.*

Certain lands, choultries, and movable property had been, by instrument in writing, given to the brother of the donor and his heirs for the purpose, in perpetuity, of keeping in repair the choultries and affording strangers the charities of shelter and, if circumstances permitted, food also, as well as for supplying the wants of the donees—with clauses restraining alienation by them.

Held, that the instrument effected a transfer of the property to the donees subject to the trust of applying the profits of the lands &c., in perpetuity to certain charitable purposes and was not revocable whether the transaction be viewed as a pure trust or as a gift.

The power of revoking gifts is given under the Muhammadan law only in the case of private gifts for the donee's own use, no relationship existing between the donor and donee.

The rule of Muhammadan law that a Muttawalee, or Superintendent of an endowment is removable for mismanagement does not apply to the case of a trustee who has a hereditary proprietary right vested in him.

It is essential for the exercise by the donor of the power of removing a Superintendent that such power be specially reserved at the time of the endowment.

1868. April 22. R. A. No. 75 of 1867, and No. 25 of 1868.

THESE were Regular Appeals from the decree of A. W. Phillips, the Civil Judge of Chingleput, in Original Suit No. 4 of 1863.

(a) Present: Scotland, C. J. and Ellis, J.

1868. April 22. R. A. No. 75 of 1867 and No. 25 of 1868.

Miller and *Rangaiya Nayudu* for the appellant, the second defendant, in No. 75.

Handley for the respondent, the plaintiff, in No. 75.

Prichard for the appellant, the plaintiff, in No. 25.

Miller and *Rangaiya Nayudu* for the respondent, the second defendant, in No. 25.

The facts are fully set forth in the following

JUDGMENT:—These are cross appeals in a suit to recover certain property which the plaintiff claims title to under a wakufnama or pious gift for charitable purposes made to him on the 14th of June 1843 by Moulavi Mahomed Malik Assalmi Saib. There is no dispute as to the right of Assalmi Saib to dispose of the property or the genuineness of the written instrument. But the defendants rely in answer on a subsequent wakufnama or pious gift executed by Assalmi Saib in their favor on the 5th of March 1854, under which they entered into possession. This instrument, they allege, revoked the gift to the plaintiff and determined his right to the property, and was made in consequence of plaintiff's mismanagement and neglect of the conditions in the instrument under which he obtained possession. The Civil Court has found this second instrument to be genuine; and that the plaintiff committed malversation by cutting down and selling some fruit-bearing trees growing on the land, and on the authority of the opinion of the Muhammadan law officer to the effect that Assalmi Saib could legally deprive the plaintiff of the right to superintend the property for malversation, but not of the benefits derivable from the land, has decreed the dismissal of the plaintiff from the superintendentship of the property, but that he continues entitled to the produce thereof after deductions of the cost of necessary repairs and of improvements and the salary of a superintendent at the rate of 5 per cent. on the annual produce.

From this decree it is not surprising to find that there are cross-appeals. In both, however, the grounds of objection relied upon raise one substantial question, whether the instrument under which the plaintiff claims passed the

1868. April 22. R. A. No. 75 of 1867, and No. 25 of 1868.

property to him for his own benefit subject to the conditions and trusts therein declared for pious and charitable purposes and was irrevocable, or whether it was a wakuf *i. e.*, an instrument of endowment constituting the plaintiff simply the superintendent of the property, liable at any time to removal for mismanagement. The Civil Judge appears to have considered that the instrument was to some extent of both characters, for whilst the decree deprives the plaintiff of the management of the property it declares him entitled to a beneficial interest in the profits.

In regard to the construction of the instrument, we entertain a clear opinion. It begins with a description of the property and its boundaries which contains the statement that " there is a large choultry and behind it there " are two other choultries, and a house situated on the " road-side. All these buildings have been created by me." It then declares that the lands and buildings had been endowed for " pious uses in favor of my dear brother Hajee " Gulam Uzmut Oollah Khooraishee and his children to " be continued in perpetuity from generation to genera- " tion," and had been delivered over to their possession together with the articles endowed for pious uses which are in the said land and house, such as brass and copper utensils, &c., and further, that the whole had been dedicated for pious uses in their favor, and " so they ought not " to possess themselves of it as their own nor suffer others " to take possession thereof. They are neither to sell nor " give it as a gift nor to lend nor mortgage the said pro- " perty." Wherefore, it was required, that the persons in whose favor the endowment was made should take care of the land and premises, and out of the proceeds realized by them " supply their wants and also if necessary appro- " priate to the execution of repairs the same. They " should not let in the premises any one except good " men, and should any good and religious man come and halt " in it, they should if possible serve (feed) him as their cir- " cumstances at the time permit. They should not allow " any heretic and wicked man to put up at them nor " suffer any unlawful act to be done there."

This plainly imports a disposition of the proprietary right to the plaintiff and his descendants partly for their own use and benefit and partly for the purpose of keeping in repair the choultries and affording the charities of shelter, and if their circumstances permitted it, food also but only to good and religious men. It is, we think, a transfer of the property subject to the trust of applying the profits of the land together with the use of the moveable articles to certain charitable purposes in perpetuity. Whether such a trust estate and partial appropriation can be considered a wakuf or pious endowment according to Muhammadan law is a point not free from doubt. (See Macn. Princ. Chap. X, Section 1, and the cases in the Appendix (title) endowments; Hamilton's Hidaya, Vol. 2, p. 334,) and at present it is not necessary to decide it as in any view of the legal effect of the disposition to the plaintiff, we think it was not revocable or resumable.

1868.
April 22.
R. A. No. 75 of 1867. and No. 25 of 1868.

This is clearly so if it is regarded as a wakuf or pious endowment, and the law appears to be the same in regard to a gift of the proprietary right when there is the relationship between the donor and donee which the instrument in this case states (Macn: Princ: Chap. V, Section 13 and Appendix tit. gift pl: 20.) But even supposing no such relationship existed, the legal power of resumption seems to us not to be applicable. It appears to be given only in the case of a private gift for the donee's own benefit, and in the present case no distinction can be made as respects the use of the property or the application of its profits. The charitable trusts are attached to the property generally which must therefore be considered at least quite as much devoted to charitable purposes as given for the use and benefit of the plaintiff and his descendants. We are consequently of opinion, that the disposition to the plaintiff was not resumable, and is unaffected by the instrument under which the defendants claim.

Then, not being resumable, is there any ground for the contention that the plaintiff was removable from the possession and control of the property for mismanagement? There is no doubt that by Muhammadan law a "Muttawlli,"

1868. April 22. R. A. No. 75 of 1867 and No. 25 of 1868.

a superintendent or trustee of an endowment, is liable to dismissal, but the rule of law, we think, only applies to an officer so designated who holds possession of the property of endowments for the purposes of management, the security of the property, and the due application of its proceeds, and has no hereditary proprietary right vested in him (Macn : Princ : Chap. X, Sections 5, 6 and Prec : of endowments Cases 8 and 10. See also cases in App : pl. 46, 59, 60.) The extracts quoted by Mr. Miller from the works Doorub Muktar p. 530, line 7 and p. 536, line 3 and *Futamee* Aulumgeree, p. 509, line 5, it seems to us, relate to such an officer only.

The plaintiff, according to our construction of the written instrument, had an hereditary trust estate vested in him, and was, therefore, we think, not a superintendent or trustee whom the grantor Assalmi Saib could remove. But further there is authority for saying that the law makes it essential to the power of the grantor to remove such an officer that it should be specially reserved at the time of the endowment Macn : Princ : Chap. X, Cl: 5. This alone would probably have been fatal to the defence on the point of removal, notwithstanding the opinion of Alee Yoosoof to the contrary as stated in passage at p. 140 of the Book Ushbahoor Nazaya to which we were referred.

With reference to the objection that the suit was barred by the Act of Limitations, we need only observe that the evidence does not show adverse possession before 1854, and the suit was brought in 1863.

For these reasons we are of opinion, that the plaintiff is entitled to the property which passed to him under the instrument of the 14th June 1843 and is now in the possession of the defendants and to be put in possession of the same.

The decree of the Lower Court will, therefore, be reversed, and in the appeal by the plaintiff, the respondent (2nd defendant) must pay the appellant's costs, as also his costs in the Court below. In the cross-appeal by the 2nd defendant each party will bear his own costs.

Decree reversed.

Appellate Jurisdiction (a.)

Special Appeal No. 458 *of* 1867.

KUPPAIYA CHETTI.............*Special Appellant.*

THASAMATHASI CHETTI and another......................... } *Special Respondents.*

A mortgagee is not entitled to be paid from the sale proceeds of property attached and sold in a suit instituted by a creditor of the mortgagor in preference to the judgment creditor at whose instance the property was attached.

The surplus, if any, may be paid to the mortgagee, there being no other unsatisfied decrees against the mortgagor, provided the sale was not made with notice that the right title and interest of the execution debtor was that of mortgagor.

THIS was a Special Appeal against the decree of C. Latchmiah, the Principal Sadr Amin of Salem, in Regular Appeal No. 34 of 1867, reversing the decree of the Court of the District Munsif of Salem, in Original Suit No. 28 of 1866. 1868. *April* 24. *S. A. No.* 458 *of* 1867.

Rama Ráu for the special appellant, the plaintiff.

Srínivása Cháriyár for the 2nd special respondent, the 2nd defendant.

The facts sufficiently appear in the following

JUDGMENT :—The plaintiff in this suit seeks to obtain the discharge of the mortgage debt due to him by the 1st defendant out of the proceeds realised on the sale of the mortgaged property after attachment in execution of a decree in a suit by the 2nd defendant against the 1st defendant, the mortgagor. The Original Court decreed in favor of the plaintiff's prior right to be paid in full. But the Principal Sadr Amin, reversing that decree, has adjudged that the claim of the 2nd defendant, the execution creditor, should first be satisfied in full, and that the surplus, if any, should be paid to the plaintiff. This adjudication is based on the priority in date of the attachment in the suit by the 2nd defendant, and the appellant's (plaintiff's) ground of objection is, that the process of attachment, if looked at, would clearly prove the contrary to be the fact, and that being so the decree of the Lower Appellate Court is wrong.

(a) Present : Scotland, C. J. and Ellis, J.

1868. April 24. S. A. No. 458 of 1867.

There is little doubt that the fact would turn out to be so. It was so considered by the Original Court, and the Principal Sadr Amin has found differently because of the non-production of any evidence in support of the statement in the plaint. But further inquiry on the point is unnecessary. It has been contended on the part of the respondent (2nd defendant) that though a prior mortgagee, the plaintiff has no preferential claim to the money, and we are of opinion that the contention is valid.

All that has been sold in execution of the 2nd defendant's decree, because all that could legally be sold, is the right, title, and interest of the 1st defendant, the execution debtor, and his proprietary right at the time was subject to the plaintiff's mortgage. If, then, the mortgage was a valid charge on the property before the attachment, it is unaffected by the sale and the purchase money cannot be treated as more than the value of the mortgagor's right of redemption. We are, therefore, clearly of opinion, that the plaintiff's claim is of no avail against the right of the 2nd defendant to be paid the full amount of his judgment debt, and on this ground the decree of the Lower Appellate Court in favor of the 2nd defendant must be upheld.

As to the surplus, if any, we think the plaintiff's claim may be upheld, there being no other unsatisfied decrees against the 1st defendant; but this opinion rests strictly on what we take to be the fact, that the sale was not made with notice that the right, title, and interest of the execution debtor was that of mortgagor, and the case therefore is not within Section 271 of the Code of Civil Procedure which expressly excludes the title of a mortgagee to share in the surplus of the proceeds of property sold subject to his mortgage.

On these grounds, we affirm the decree appealed from. The appellant must pay the costs of the 2nd respondent (2nd defendant) in this and both the Lower Courts, and he and the 1st respondent will each bear his own costs throughout.

Appeal dismissed.

Appellate Jurisdiction (a)

Criminal Petition No. 225 *of* 1867.

PALANY CHETTY...*Appellant* (*Prisoner*).

Proof of contradictory statements on oath, or solemn affirmation, without evidence as to which of them is false, is sufficient to justify a conviction, upon an alternative finding, of the offence of giving false evidence, under Section 72 of the Indian Penal Code and Sections 242, 381 and 382 of the Criminal Procedure Code.

The English Law upon the subject stated.

THIS was an appeal against the sentence of the Court of Madura in Case No. 86 of the Calendar for 1867. 1868. *May* 18. *C.P. No.* 225 *of* 1867.

This appeal coming on for re-hearing, the Court delivered the following

JUDGMENT:—This is an appeal against a conviction on the charge that the appellant, being a witness in a judicial proceeding before the Subordinate Magistrate of Tirumangalam, and afterwards before the Session Court of Madura, knowingly gave two depositions on solemn affirmation directly opposed to one another, and that he thereby committed the offence of giving false evidence in a Judicial Proceeding contrary to Section 193 of the Penal Code. The evidence proves that the appellant was examined as a witness on solemn affirmation in an inquiry before the Subordinate Magistrate into the charge of criminal misappropriation of certain jewels against one Ramanadha Pillay, and then made a material statement as to the said Ramanadha Pillay and two other persons having come to his shop on a particular day with jewels which they sold to him, and that he knowingly and deliberately deposed directly the contrary when examined on solemn affirmation as a witness on the trial of the same charge before the Session Court. One or other of the statements must be intentionally untrue, but which is left quite uncertain, and the question for determination is, whether the contradictory statements without more are sufficient to sustain the conviction. The case has not been argued, but the arguments of Counsel in two recent cases in which it became unnecessary to decide the point have been considered.

(a) Present: Scotland, C. J. and Collett, J.

1868. May 18. C. P. No. 225 of 1867.

The rule of the Criminal Law of England as laid down before the decision in *The King* v. *Harris* (5 Barn & Ald, 296), admitted of a conviction of the offence of perjury charged on one of two opposing statements on oath, being supported by proof simply of the two statements: but the rule was rested on the technical and not satisfactory principle that whichever happened to be charged as false, the defendant was estopped by his oath from averring that the other was not true, applying it seems the maxim "*nemo allegans turpitudinem suam est audiendus.*" Since, however, the case of *The King* v. *Harris* (which decided that a count setting out two opposing statements and charging inferentially the falsity of one or the other of them was bad) the contrary has been held to be the rule on the sound principle that though it may accurately be predicated of two statements of a person diametrically opposed to one another—that one is false, it cannot be said decisively which is the false one without other evidence. The law requiring that the falsity of one or other of the statements should be specifically charged and found by the jury, proof of the contradictory statements without more is justly considered insufficient to support a conviction:—and the same rule we should at once have held applicable to this case (Regulation III of 1826 having been repealed) if the same precision had been required by the law of Criminal Procedure here.

Distinct charges in cases in which the circumstances admit of two or more alleged offences are clearly requisite when it is doubtful which will be proved. But the provisions in Sections 242, 381 and 382, Clauses 5 and 11 of the Code of Criminal Procedure and Section 72 of the Penal Code read together plainly do away with the necessity of a specific finding in such cases, and admit of the alternative finding that either of two or more of the offences specified in the charges has been committed, whether the charges are framed on the same Section or different Sections of the Penal Code. It is on the applicability of this mode of procedure to the case that the validity of the conviction depends; for, as this Court has recently ruled on the revision of two cases of convictions of the offence of

1868. May 18. C. P. No. 225 of 1867.

giving false evidence, where there is only a single charge alleging the falsity of one of two contradictory statements, a conviction on proof simply of the statements is not sustainable. And if the procedure is applicable, all objection to a conviction supported by such proof alone is removed. It is proof of a satisfactory description and the alternative conviction becomes a legal bar to any other criminal proceeding against the same person on either of the charges to which the conviction relates. And that justice demands the punishment of a witness who is proved to have so foresworn himself no one can doubt. Such false evidence is often of a much graver character and of more serious effect on the administration of the Criminal Law than when a single statement is made, and it would be strange to find the provisions of the very law which led to the repeal of Regulation III of 1826 defective to punish so vicious an instance of perjury.

The contention in the cases that were argued was that the procedure provided for by the abovementioned Sections applied only to cases in which two or more offences appear to have been committed, but it was doubtful which would be proved, and that here there could not have appeared at any time more than a single *offence*. For this contention some show of reason is afforded by the words " two or more *offences*" in Section 242. But when the whole enactment is given effect to, we think it clear that the Section applies to cases in which only one offence appears to have been committed, and there is a doubt within which of two or more Sections it will be brought; or which admit of two or more alleged offences within the same Section, and it is doubtful which one will be proved. The essentials are—evidence of a case shewing an offence to have been committed but admitting of charges of two or more offences and doubts as to which of those charges the offence committed will be proved to be. In this case the offence of giving false evidence appeared, and either statements might have been proved to be that offence, but it was quite in doubt which was false. We are consequently of opinion that Section 242 applies, and the case being one in which charges on both statements were pro-

1868. May 18. Cr. P. No. 225 of 1867.

per under that Section, it follows clearly, we think, that the conviction in the alternative is regular and valid.

Sections 381 and 382, Clauses 5 and 11 have distinct reference to the offences specified in the charges, and the statements of particular offences given in the forms are obviously given only as examples. For these reasons our judgment is that satisfactory proof of contradictory statements on oath or solemn affirmation is sufficient to justify an alternative finding, and that the conviction and sentence in this case must be upheld. It is satisfactory to find that our view of the law is supported by the decisions of a full Bench of the High Court at Calcutta in *The Queen* v. *Mussemut Zameeru* reported in 2 *Rev. Cr. Reports* 49.

It is necessary to observe, with reference to the charge and finding of the Session Court, that neither is strictly regular. In every similar case there should be a separate head of charge in respect of each statement, and the finding and sentence should be in conformity with the form given in Section 382 of the Criminal Procedure Code.

Conviction affirmed.

Appellate Jurisdiction (a)

Special Appeal No. 312 *of* 1868.

RAMANUJA CHARIYAR.......... *Special Appellant.*

VENKATAVARADHAIYANGAR and another.............. } *Special Respondents.*

The effect of Section 11, Act XIV of 1859, is to provide a distinct period of limitation applicable to every case in which, but for legal disability, the suit would be barred.

In other words to add three years from the time the disability ceases to the period of limitation made applicable by the Act to the particular case.

1868. July 29. S. A. No. 312 of 1868.

THIS was a special appeal against the decree of A. Annusami Mudaliar, the Acting Principal Sadr Amin of Tanjore, in Regular Appeal No. 12 of 1868, confirming the decree of the Court of the District Munsif of Tiruvady in

(a) Present: Scotland, C. J. and Ellis, J.

Original Suit No. 357 of 1865. The suit was brought for the recovery of certain land which plaintiff declared had been illegally sold by his mother in 1858, during his minority. The 1st defendant pleaded that the suit was barred under Section 11, Act XIV of 1859, plaintiff having come of age in 1860, and the suit not having been brought until 1865. Both the Lower Courts decided in favor of the defendants. The plaintiff preferred a special appeal.

1868. July 29. S. A. No 312 of 1868.

Sunjiva Ráu for the special appellant the plaintiff.

Srinivása Chariyár for the 1st special respondent, the 1st defendant.

The Court delivered the following

JUDGMENT:—The sole question in this appeal is whether the decision of the Principal Sadr Amin that Section 11 of the Limitation Act (14 of 1859) barred the suit is wrong. The facts are that the right of action for the recovery of the land in question first accrued in 1858 and at that time the plaintiff was a minor. In 1860 he came of full age, and in 1865 brought the present suit. The Principal Sadr Amin, affirming the decision of the District Munsif, has held that Section 11 imposes in every case of legal disability the strict limitation of 3 years from the time that the disability ceased, and the plaintiff could not avail himself of the unexpired portion of the 12 years period of limitation applicable to a suit for the recovery of land.

We are of opinion that this construction is wrong, but looking at the language and frame of the Section, we are not surprised that the Principal Sadr Amin should have experienced difficulty in dealing with the Section and so construed it. He has erred in not giving effect to the other Sections of the Act providing for the periods of limitation which must elapse in order to bar the right to bring a suit. Read with these provisions there is no doubt that the section was intended to prevent the several periods of limitation running against persons whilst under legal disability and to provide an additional period of limitation to be computed from the time when disability ceased; and the language of the enactment admits of that intention being given effect to. It is not imperative but permissive; "the action may be brought;" and the time

1868. July 29. S. A. No. 312 of 1868.

allowed is to be computed from the time the disability has ceased just as from the accruing of the cause of action in other cases and it is as long as the periods of limitation applicable to some suits and longer than those applicable to others. We think the effect of the Section must be construed to be to provide a distinct period of limitation applicable to every case in which but for legal disability the suit would be barred. In other words to add 3 years from the time the disability ceases to the period of limitation made applicable by the Act to the particular case. In this case, therefore, the Section does not operate to bar the plaintiff's right of action.

The decree must be reversed, and the suit remanded for hearing and determination on the merits. The costs in this and both the Lower Courts will abide the decree in the suit and must be borne by the party who fails on the merits.

Appeal allowed.

Appellate Jurisdiction (a)

Civil Petition No. 77 *of* 1868.

COMALAMMAL, guardian of SASHADRI IYENGAR, minor son of the late CODIALEM SASHADRI IYENGAR.

against

RUNGASAWMY IYENGAR.

The first hearing of a suit took place on 16th November, when issues were settled and the final hearing of the suit was fixed for the 22nd January following. On the 22nd January the plaintiff changed her Vakil and applied by the new Vakil for a summons a witness, and on the 23rd the new Vakil stating that, owing to the absence of his witnesses, he was not prepared to go on with the case, the Judge dismissed the suit.

Held, that under Section 148 of the Civil Procedure Code the Judge was justified in dismissing the suit.

Section 119 of Act VIII of 1859 does not empower a Judge to set aside a decree passed under Section 148 of the same Act.

Semble—Section 114, as well as Sections 110 and 111 of the Code have reference only to the first hearing of the suit, which may be either on the day named in the summons or on a subsequent day to which such hearing may have been adjourned.

1868. May 22. C. P. No. 77 of 1868.

THIS was a petition against an order of R. Davidson, the Civil Judge of Trichoinpoly, on Miscellaneous Petition No. 160 of 1868.

(a) Present: Bittleston and Ellis, J. J.

O'Sullivan for the petitioner.

Miller for the counter petitioner.

1868. *May* 22. *C. P. No.* 77 *of* 1868.

This petition coming on for hearing, the Court delivered the following

JUDGMENT:—This is an appeal from an order of the Civil Judge of Trichinopoly, refusing the application of the plaintiff in a suit to set aside a decree dismissing the suit for default. The decree appeared to have been passed under Sections 114 and 148 of the Civil Procedure Code, and the application to set it aside was made under Section 119 of the Code.

As the decree could not be passed under both the Sections named, we must see under which of the two Sections, if either, it can be maintained.

Now Section 114 applies to the case of a plaintiff not appearing at the first hearing of the suit either in person or by a pleader; and there is no doubt that in this case the plaintiff did appear by a pleader. No judgment by default could therefore be passed against the plaintiff under that Section.

But though the plaintiff appeared by a vakil, the vakil stated that he was not prepared to go on with the case, the witnesses not being in attendance, and the question therefore is whether under Section 148 the Judge had the power to dismiss the suit.

The facts are that the first hearing of the suit took place on the 16th November 1867, when issues were settled and the case adjourned to the 22nd January which was the day fixed for the further hearing of the suit and for the production of evidence by the parties. On the 17th January the plaintiff by her vakil applied for 3 months' time, which was refused. On the 22nd January the plaintiff changed her vakil and applied by the new vakil for a summons to a witness and also for the examination of the former vakil, and on the 23rd the new vakil stating that by reason of the absence of witnesses he was not prepared to go on with the case, the Judge dismissed the suit.

1868. May 22. C. P. No. 77 of 1868.

Is then this a case to which Section 148 applies ? Mr. O'Sullivan argued that it did not, because no time had been granted to the plaintiff: and unless the adjournment from the first hearing to the 22nd January was, within the meaning of Section 148, a granting of time to the plaintiff, the argument is well founded. But, upon a close examination of the various Sections of the Code bearing on the question, we think that the case did fall within Section 148.

Under Section 41 the summons to the defendant in a suit may be issued either for a final disposal or for a settlement of issues. If it be issued for final disposal, then the form of summons given in the schedule B requires the defendant to produce all his witnesses on the day named therein; and if either party fail without sufficient cause to produce the evidence on which he relies, then by Section 145 the Court is authorised at once to give judgment against the party so failing, and this judgment could not be set aside excepting upon appeal in the ordinary course.

If the summons be for settlement of issues and the parties are at issue upon some question of law or fact, the Court may, under Section 145, proceed at once to determine the issues, if satisfied that no further argument or evidence is required than can then be supplied by the parties ; but otherwise the Court is bound to postpone the further hearing and fix a day for the production of such further evidence or for such further argument. Now when the latter course is taken the parties are then in the same position with reference to the day so fixed as they are upon a summons for final disposal with reference to the day named therein; that is to say they are bound to be ready with their witnesses on that day, unless prevented by some sufficient cause. It would then be very strange if the Legislature had provided that a failure to produce the evidence should in the one case subject the party to an adverse judgment, but not in the other case. Yet such is the result if Section 148 has not the effect of authorising the Court to pass an adverse judgment against a party failing to produce his proofs upon the day fixed for final disposal after a previous settlement of issues. In fact whenever a case is ad-

journed to a further day for the purpose of enabling parties on that day to produce evidence, time is granted to both parties whether the adjournment takes place upon the special application of either of them, or by reason of a provision of the Code requiring such adjournment; and in our opinion Section 148 must have been intended to apply to all cases of adjournments to a future day for the purpose of enabling parties to produce evidence on that day. In all such cases, if the parties or either of them shall not appear in person or by a pleader, Section 147 authorizes the Court to proceed in the manner pointed out in Sections 110, 111 or 114 as the case may be; but the language of Section 147 does not raise any question about the meaning of the words "a party to whom time may have been granted;" for it speaks only of adjournment generally; and Section 146, though it clearly authorises the Court to grant time and adjourn the hearing of a suit upon application by the parties or either of them, is not limited to such applications, but gives to the Court independently of any application a general power to adjourn the hearing of a suit from time to time.

It might appear at first sight that Section 147 is unnecessary, because Section 110 itself provides for the case of non-appearance of the parties on the day fixed for defendant to appear and answer, or on any other day subsequent thereto to which the hearing of the suit may be adjourned; but it appears to us that this Section and Sections 111 and 114 have reference only to the first hearing of the suit which may be either on the day named in the summons or a subsequent day to which the first hearing may have been adjourned.

Having then come to the conclusion that the Judge was authorised under Section 148 to pass judgment against the plaintiff, who failed to produce her witnesses on the day fixed for that purpose, and that he did dismiss the suit under that Section, it follows that the application to set aside the decree under Section 119 of the Code was properly refused; though it was refused by the Judge upon the merits of the case and not on the ground that Section 119 gave him no power to set it aside.

1868. May 22. C. P. No. 77 of 1868. We were asked to give leave now to file a regular appeal against the decree, the time for appealing having expired. But we think that that must be the subject of a distinct application in the usual course, as to which we can say no more than that the Judges before whom it may be brought will of course take into their consideration all the circumstances connected with this present application, and will have the same means of judging whether they afford a sufficient cause for not having presented the regular appeal in proper time which we have.

Appellate Jurisdiction (a)

Special Appeal No. 50 *of* 1868.

J. RAYACHARLU............*Special Appellant (Defendant.)*

J. V. VENKATARAMANIAH.*Special Respondent (Plaintiff.)*

A son during the life of his father has, as coparcener, a present proprietary interest in the ancestral property to the extent of his proper share; but beyond that he has vested in him no legal interest whatever whilst his father is alive.

Except in respect of his coparcenery rights a son is not in a different position as to the corpus of the ancestral property from that of any other relation who is an heir apparent of the owner of property.

Though the Limitation Act may have been decided to be a bar to a suit by the son for partition, his right as coparcener has not thereby been destroyed, and it may be that he is entitled to relief against the improper disposal by the defendant of more than his proper share of the property.

1868. May 27. S. A. No. 50 of 1868. THIS was a special appeal from the decision of E. B. Foord, the Civil Judge of Berhampore, in Regular Appeal No. 16 of 1867, confirming the decree of the Court of the District Munsif of Chicacole, in Original Suit No. 237 of 1864.

Sanjiva Rão for the special appellant, the defendant.

Snell for the special respondent, the plaintiff.

The facts sufficiently appear in the following

JUDGMENT:—The plaintiff in this case is the only son of the defendant, and the relief sought by the suit is a declaration of the plaintiff's right, on the death of his father, to the whole of the ancestral property movable and

(a) Present: Scotland, C. J., and Collett, J.

immovable now in his father's possession, and that his father may be restrained from dissipating the property. The defence pleaded is, that the defendant possesses the exclusive right to the movable property, that the plaintiff's right to recover a share of the property had been decreed on appeal in a former suit to be barred by lapse of time, and that the produce of the lands is not sufficient to maintain the defendant.

The Original Court decided that the decree in the former suit did not affect the plaintiff's claim as heir on his father's death, and passed a decree declaring the plaintiff's "reversionary" right to the whole of the immovable portion of the property after the defendant's death, and against his right to the movable portion on the ground that the defendant had the absolute right to dispose of such portion.

Both the parties appealed to the Civil Court, and that Court has affirmed the original decree. The special appeal to this Court is by the defendant, and the question upon which the plaintiff's right to maintain the suit depends is substantially whether a son can, during his father's life-time, sue to obtain the adjudication of a right as reversionary heir to all the existing immovable family property and to have it preserved for his enjoyment at his father's death? If the plaintiff possesses such an interest, it is clear that the decree in the former suit is not a conclusive defence in this suit, as the sole question before determined was that the Act of Limitations had barred the right to sue for a partition.

A son during the life of his father has, as coparcener, a present proprietary interest in the ancestral property to the extent of his proper share; but beyond that he has vested in him no legal interest whatever whilst his father is alive. The father, to the extent of his own share as coparcener, is entitled to make valid dispositions, and it is not until his death that any interest arises to the son as heir. See *Vírasámi Grámíni* v. *Aiyasami Gramini* (1 M. H. C. Reports 471) and *Palominelappa Kandan* v. *Manuaru Naiken and another* (2 M. H. C. Reports 416.) Except in respect of his

1868. May 27. S. A. No. 50 of 1868.

coparcenery rights, a son is not, we think, in a different position as to the corpus of the ancestral property from that of any other relation who is an heir apparent of the owner of property. The Lower Courts appear to have considered that the plaintiff had acquired a reversionary right in the property. But that right exists only when the possession and enjoyment of property has passed from the owner only for a limited particular estate or interest as in the instance of the succession of a widow to her husband's property. She takes only a life-estate, and the reversionary right to the property passes to the next heirs of the husband subject to certain conditions. But in no view of the present case does it appear that the plaintiff has such a right.

As only son he has a present proprietary interest in one undivided moiety of the property, and nothing more. Consequently, the suit for the establishment of an existing reversionary right in him as heir to the whole property on the death of the defendant, and the decrees declaring such right, are groundless. Though the Act of Limitations has been decided to be a bar to the remedy by suit for a partition, the plaintiff's right as coparcener has not thereby been destroyed, and it may be that he is entitled to relief against the improper disposal by the defendant of more than his right to an undivided moiety of the property. But if so, (and we give no opinion on the point) that relief must be sought in a suit founded on the plaintiff's coparcenery rights and on proof of illegal conduct on the part of the defendant which works an injury to such rights. Our judgment on this point renders it immaterial to refer to the fact pointed out in argument that part of the property is inam land not included in the former suit for partition.

For these reasons, we are of opinion that the decree appealed from must be reversed, and the suit dismissed. The parties will each bear his own costs in both the Lower Courts, but the respondent must pay the appellant's costs of this appeal.

Appellate Jurisdiction (a)

Special Appeal No. 97 of 1868.

KRISTNASAMY TATACHARRY and 2 others.................. } *Special Appellants.*

GOMATUM RANGACHARRY...... *Special Respondent.*

The question whether there was a sufficient ground for the dismissal of a pagoda hereditary servant by a Dharmakarta is one of degree and not of principle, and must therefore depend upon the circumstances of each case.

The finding of the Lower Courts upon such matters must be treated by the High Court on special appeal as a conclusive finding upon a matter of fact, unless it be supported by no evidence whatever.

1868. *June 5.* *S. A. No. 97 of 1868.*

THIS was a special appeal against the decree of W. S. Whiteside, the Acting Civil Judge of Chingleput, in Regular Appeal No. 14 of 1865, reversing the decree of the Court of the District Munsif of Conjeveram, in Original Suit No. 736 of 1862.

The facts in this case are fully set forth in the judgment of the Civil Judge, which is as follows:—

"In this suit the plaintiff sued in the Conjeveram District Munsif's Court to recover the 9th Tirtham Arulappadu in the pagoa of Shridevaraja Swami in little Conjeveram which had descended to him as a mirasi right from his ancestors and was confirmed to him by the decrees in Nos. 43 of 1845 and 20 of 1851 of the late Principal Sadr Amin's Court, and 91 of 1856 in the Conjeveram District Munsif's Court, and held by him up to the end of February 1861 when it was withdrawn from him by the defendants who are the Dharmakartas of the pagoda.

The defendants deny the plaintiff's claim and state in reply that the plaintiff was punished by the Magistrate for causing a disturbance in the pagoda, in the course of which he beat and outraged the defendants themselves, for which misconduct he was dismissed by them from his service in the pagoda, and with it he, by consequence, lost the mirasi right that he now claims, and that plaintiff's dismissal was in accordance with the authority vested in them by the

(a) Present: Scotland, C. J., Bittleston and Ellis, J.J.

1868. June 5. S. A. No. 97 of 1868.

decree of the late Sadr Court No. 49 of the year 1858 as Dharmakartas to remove pagoda servants from their appointments.

The District Munsif examined no witnesses on either side and based his judgment upon the decree above noted, and a takid from the Collector No. 107, dated 27th September 1860, in which reference is made to the fact that plaintiff had been fined for assault on the 1st defendant, and considering that in view of so grave an offence the defendants were justified in dismissing the plaintiff from office in the pagoda, he dismissed the plaintiff's suit with costs.

The plaintiff now appeals and urges that the misconduct laid to his charge is not grave enough to warrant the defendants in removing him summarily from a mirasi right which had descended to him from his ancestors, and that the Sadr Court's decree relied on by defendants does not apply to this suit; and that the remarks or statements in the Collector's takid upon which the District Munsif based his decree referred to a matter quite foreign to this suit, and that those remarks in no way justified the deprivation of plaintiff and his descendants of the ancient merasi right hitherto enjoyed. That the real fact which is at the bottom of the whole case is, that the defendants are of the Vadagalai sect and plaintiff of the Thengalai sect, and that this removal of the plaintiff from his hereditary mirasi right in the pagoda is solely caused by the religious enmity the defendants entertain towards him.

This is the 4th suit in which the plaintiff and the defendants are parties. The defendants, the Dharmakartas of the paogoda, are all of the Vadagalai sect. The plaintiff (appellant) on the other hand belongs to the Thengalai sect, and they are on terms of great enmity in consequencce. The plaintiff is one of the members of the Local Committee appointed by Government for the management of the pagoda, and he further has the right to the 9th Tirtham Arulappadi in the pagoda which has descended to him from his fore-fathers. The defendants have on repeated former occasions removed the plaintiff from his office in the pagoda and in all the

1868. June 5. S. A. No. 97 of 1868.

consequence litigation thereon the plaintiff has had the best of the contest and been restored to office, only to be turned out again in a short time by the defendants. On the present occasion it appears from the documents filed in this suit on both sides (and upon which the Lower Court passed the decree now under appeal) as well as the pleadings of the vakils on both sides, that in the year 1860 the plaintiff preferred a charge before the Magistrate against the defendants of having misappropriated the funds and property of the pagoda, and in consequence and pending inquiry into the case, certain rooms in the pagoda where property and accounts were kept were sealed up at the plaintiff's desire, as in them were certain papers on the contents of which he relied to prove his charge against the defendants. The defendants then applied to the Magistrate of the District, and stated that it was necessary that certain ceremonies should be performed in those store rooms that plaintiff had got sealed up, and they requested that the seals might be broken and the property in the rooms removed. The Magistrate then sent an order to the Thasildar directing him to have the seals broken open and the property in the rooms removed in the presence and superintendence of the *plaintiff*, the defendants, and the Thasildar. The Thasildar then broke the seals and opened the rooms in the presence of the defendants, but in *absence* of *the plaintiff*, who came running to the spot, hearing of what was going on and declared that certain important papers upon which he relied to prove his magisterial charge against the defendants had been made away with, or removed fraudulently by the defendants before he arrived,—an uproar then followed, and the defendants soon after charged the plaintiff before the District Magistrate with having assaulted them, and the plaintiff was fined by the Magistrate. The defendants then proceeded to punish the plaintiff themselves. They dismissed him (as they had done several times before) and with it cancelled his mirasi right for which he now sues.

The Lower Court was of opinion that the plaintiff's misconduct was such as to warrant his dismissal from office as a bad servant of the pagoda, and rejected his claim, but

1868.
June 5.
S. A. No. 97
of 1868.

this Court is of opinion that the District Munsif erred in not giving more weight and consideration to the facts that were admitted on both sides as well as apparent from the record of the repeated suits between the parties.

The plaintiff as member of the Committee for the management of the pagoda had brought to the Magistrate's notice certain alleged misconduct of the defendants as regarded the pagoda property, and pending the inquiry certain rooms were locked up containing accounts upon which plaintiff relied to prove his case.

The defendants just at this crisis made an excuse for getting the seals broken. The doors were opened in plaintiff's absence, and on his running to the spot he declared that the defendants had taken advantage of his absence to conceal the papers he desired to produce before the Magistrate in support of his case against them. It is not surprising that under these circumstances seeing that his case against the defendants would break down, that he (however reprehensible his conduct may have been) lost his temper and created a disturbance. For his conduct on that occasion he was duly punished by the Magistrate, and the question then arose whether his offence was of such a heinous nature as also to justify his summary dismissal from the pagoda service, and the forfeiture of his ancestral mirasi rights. The plaintiff acting for the best interests of the pagoda had invited inquiry into the mode in which the pagoda property had been made use of, the parties he had accused of misusing the pagoda property ingeniously managed to get the doors of the rooms opened in plaintiff's absence. A moment or two would be all that was necessary to enable them to get hold of the obnoxious papers that plaintiff relied on; and on plaintiff's coming to the spot and finding as he stated that the papers had vanished and his case in consequence fallen to the ground, it was not unnatural that in the heat and irritation of the moment he forgot himself, and the position of the defendants, and simply regarding them as men who had cleverly tricked him, in his anger, rendered himself in turn liable to a magisterial charge, which opportunity the defend-

ants quickly took advantage of. There can be no doubt that the difference of sect is what is really at the bottom of the anxiety and repeated efforts of the defendants to oust the plaintiff from his place in the pagoda. On the present occasion they had undoubtedly given him much and great provocation. They had undoubtedly evaded the plain orders of the Magistrate and got access to the rooms and their contents in the plaintiff's absence. Having been once punished by the Magistrate it is unnecessary persecution now to seek to enhance his punishment by entire deprivation of office and complete loss of all his ancestral mirasi privileges. Had the Dharmakartas temporarily suspended the plaintiff from office and then restored him with a warning, no one could have accused them of undue severity; as it is, it is clear they eagerly took advantage of plaintiff's loss of temper to remove him from his obnoxious presence and office in the pagoda. To justify such a severe penalty it should be proved that the plaintiff had been or is a bad servant to the pagoda; that is to say dishonest, neglectful of his duties, incompetent and so forth, and this has not been shewn. His offence was towards the Dharmakartas *individually*, who had without doubt given him great provocation, and for that offence they had him duly punished. It would be persecution to admit that the plaintiff and his family should in addition for ever lose the ancestral rights that he has been so long enjoying.

1868. June 5. S. A. No. 97 of 1868.

For the foregoing reasons the Court resolves to reverse the decree of the Lower Court, and hereby orders that the plaintiff (appellant) be forthwith restored to office in the pagoda and to the enjoyment of the mirasi rights, privileges, &c. for the recovery of which this suit has been brought. Defendants (respondents) to bear all the plaintiff's costs."

Against this decision the defendants preferred a special appeal.

Srinivása Chúriyár for the special appellants, the defendants.

Parthasárathi Aiyangár for the special respondent, the plaintiff.

1868. June 5. S. A. No. 97 of 1868

This special appeal coming on for re-hearing the Court delivered the following

JUDGMENT :—We are unable to say that the decision of the Civil Judge in this case is contrary to any law, or usage having the force of law, or that there has been any substantial error or defect in law in the procedure or investigation of this case; and, therefore, without saying whether, if the case had been presented to us originally or in regular appeal, we should have come to the same conclusion, we think that we should be overstepping our province if we were to interfere with the decision of the Civil Judge, which must therefore be confirmed.

We were invited, during the argument of this special appeal, to lay down some general rules defining the degree and kind of misconduct which would justify the dismissal of a pagoda servant holding an hereditary office like the plaintiff's by the Dharmakartahs; but it would be impossible, we think, to do so at all exhaustively and very injudicious to make the attempt. The determination of each case must depend upon the particular circumstances established in it, and when the question, whether there was a sufficient ground of dismissal, is one of degree and not of principle, the finding of the Lower Appellate Court must be treated by this Court as a conclusive finding on a matter of fact, unless it appears to be opposed to every reasonable view of the material evidence: in other words is without evidence to support it. On the other hand if the Lower Appellate Court has proceeded upon an erroneous view of the legal relation between the parties, or of any of the legal incidents of that relation, it would be the duty of this Court, on special appeal, to correct any error of that kind. If for example we were prepared to say that in point of law any assault by a pagoda servant on one of the Dharmakartahs would justify dismissal, whatever were the circumstances under which the assault was committed, then we should find that the Civil Judge had erred in point of law and ought to reverse his decision; but as we are not able to lay down any such proposition, and are of opinion that it would, under the circumstances of this case, have been a proper question to leave to a jury whether

there was a justifying cause of dismissal as was done in *Ridgway* v. *The Hungerford Market Co.* (3 Ad: and Ell: 171), and *Horton* v. *McMurtry* (29 L. J. Exch: 260); and as there was proof of circumstances connected with the assault in this case from which the Judge might reasonably form the conclusion that he did, we think that we are not at liberty to set aside the verdict of the Judge and find a new one ourselves.

1868. *June 5.* *S. A. No.* 97 *of* 1868.

In Special Appeal No. 8 of 1854 the Sadr Court appears to us to have gone further than the limits of a special appeal allow.

It was pointed out to us that the Civil Judge had made a mistake in his judgment in saying that "the plaintiff *as a member of the Committee for the management of the pagoda* had brought to the Magistrate's notice certain alleged misconduct of the defendants regarding the pagoda property." Whereas, he was not appointed a member of that Committee until some years after; but the material part of the Judge's remark, viz., that the plaintiff had made a charge against the defendants to the Magistrate, is not incorrect, and we consider it unnecessary to send the case back to the Judge for the purpose of asking him whether, if he had borne in mind that the plaintiff was not on the Committee at the time when he made the charge, that circumstance would have altered his judgment on the merits of the case. We confirm the decision of the Civil Judge, but without costs. Having reference to Special Appeal No. 8 of 1854, we think the appellants had a fair ground for asking this Court to review the judgment of the Lower Appellate Court.

Appeal dismissed.

Appellate Jurisdiction (a)

Regular Appeal No. 6 of 1868.

W. B. Basappa......................................*Appellant.*

Y. Yenkatappa......................................*Respondent.*

Regulation VI of 1831 prohibits the Civil Courts from taking cognisance of a suit brought to recover the value of three years' produce of certain land (held by the plaintiff on Service Inam tenure), on the ground that the defendant, who held a lease from the plaintiff, wrongfully refused to give up possession on the expiration of his lease and continued to hold the land and to deprive the plaintiff of the possession and enjoyment thereof.

Bassapah v. *Kooroovatappa* Mad. Sadr Dec. 1858, p. 263, distinguished.

1868. *June* 17. *R. A. No.* 6 *of* 1867.

THIS was a Regular Appeal from the decree of H. E. Sullivan, the Acting Civil Judge of Bellary, in Original Suit No. 15 of 1867.

Parthasaradhy Aiyangar, for the appellant, the plaintiff.

The facts sufficiently appear in the following

Judgment :—This is a suit to recover the value of three years' produce of certain land held by the plaintiff on Service Inam tenure, and the ground of the suit is that the defendant, who held a lease from the plaintiff, wrongfully refused to give up possession on the expiration of his lease in 1864 ; and that he continues to hold the land and to deprive the plaintiff of the possession and enjoyment thereof.

The defendant did not put in any written statement, but filed the document under which he claimed, and which purported to be a lease from the plaintiff to him for 8 years from 1863.

The Civil Judge held that, by Regulation VI of 1831, he was prohibited from taking cognisance of the suit, and we think that he was right in so holding.

The 3rd Section of that Regulation enacts that claims to the possession of or succession to hereditary village or other offices in the Revenue and Police Departments or to

(a) Present : Bittleston and Ellis, J.J.

the enjoyment of any of the emoluments annexed thereto shall not be cognisable by the ordinary Courts of Judicature, and Section 4 provides that all such claims are to be brought before the Collector for adjudication, an appeal being given from his decision to the Board of Revenue, and the order of the Board being subject to revision by the Governor in Council. It was argued before us that these provisions are not applicable to the present case, because the plaintiff's title as Inamdar is not disputed, and some decisions of the late Sadr Court were cited. The case principally relied upon was *Bassapah* v. *Kooroovatappa* at p. 268 of the decisions of 1858; in which the plaintiff complained that the 1st, 2nd and 3rd defendants in collusion with the 4th had carried off the produce of certain Inam land which he held under mortgage from the 4th defendant. The defence was that the said crop had been raised by 4th defendant and sold by him to the other defendants, and the Court of Sadr Adalat were of opinion that, taking the plaintiff's representations to be true, Regulation VI of 1831 presented no bar to the adjudication of his claim, and they said in their judgment " the question in issue is not the title to the Inam, but to certain produce raised by permission of the Inamdar, the point to be decided is, whether the plaintiff raised the said produce or not," and the case was remanded to the District Munsif that he might decide that matter.

But that is certainly a very different case from the present. There the Inamdar was claiming nothing and complaining of nothing. The dispute was entirely between third parties both of whom were claiming under the Inamdar ; and the question was whether the defendants 1 to 3 had carried off a crop raised by the plaintiff. Even the title of the plaintiff as mortgagee was not impeached in that suit though the Regulation 6 of 1831 clearly renders null and void any mortgage of Service Inams. In the present case, the Inamdar is suing for 3 years' produce of the Inam land, which the defendant is withholding from him, and though the defendant does not deny that the plaintiff is the Inamdar, he does deny the plaintiff's present right to hold and enjoy the lands. We do not see how it can be

1868. June 17. R. A. No. 6 of 1868.

said that this suit is not a claim to the enjoyment of the emoluments annexed to the plaintiff's office. The main object of the Regulation 6 of 1831 appears to have been to prevent the appropriation of the emoluments derived from lands and other sources and annexed to various hereditary village and other offices in the Revenue and Police Departments, to purposes other than those for which they were originally designed; and, in order to secure the due performance of the services, to prevent any separation of the emoluments from the offices. With a view to accomplish that object the adjudication of all claims to such emoluments is confined to the Revenue Authorities subject to the ultimate control of the Government, and if it should be held that that provision applies only to cases where the title of the person claiming as Inamdar is disputed it appears to us that the main purpose of the enactment would in very many cases be defeated.

Nor could it, we think, have been the intention of the late Sadr Court to lay down any such general proposition, for under the somewhat similar enactment contained in Regulation IV of 1831 with respect to a different class of Inams, it was laid down as a Rule of Practice that in the case of plaints relating to Inams or grants by the ruling power, the Judge is to ascertain by reference to the enactments of the Legislature and the Rulings of the Sadr Court, whether the plaint is admissible or not before he brings it on his register of suits (R. of Pr. 18 Nov. 1861, p. 27), and therefore in most cases before he can tell whether the title of the person claiming as Inamdar will be disputed.

It is not inconsistent with this to hold as the late Sadr Court appears to have done under Reg. IV of 1831 that suits for rent due on Inam land where the right to Inam is not in dispute are admissible by the Courts without the previous permission of Govt. (Sadr Pro. 26th June 1856), for in such cases the suit is brought upon a contract of tenancy; but in the case cited before us from the Sadr Court Decisions of 1856, p. 128, the Sadr Court took a distinction between the rent of Inam land and an allowance payable from the collection of the Inam village. They

1868. June 7. R. A. No. 6 of 1868.

observed that it could not be determined from the record whether the annual sum claimed by the plaintiff was the rent of the Inam land or an allowance payable from the collection of the Inam village; "if the former (they said) the suit is not opposed to the provisions of Reg. 4 of 1831 and Act 31 of 1836 as it becomes one for debt, not for proprietary right; but if the latter, the enactments quoted would be a bar to its institution." If this distinction be sound, it would seem to exclude the present case from the cognisance of the Courts, but the distinction seems to be between a mere money rent and an allowance out of the village collections, and such an allowance might be as truly a rent as the other; and out of the failure to pay a debt might arise in the one case as well as in the other. The ground on which the decisions as to suits for rent may be more satisfactorily put appears to us to be that already mentioned, viz., that the suit is brought simply for a breach of contract by the defendant; and the same ground will apply to the cases in which it has been held that an Inamdar, whose Inam is of a kind which may lawfully be mortgaged, may maintain a suit to redeem his Inam land from mortgage (Sadr Pro. 22nd October 1859). Further, the case referred to by the Civil Judge (Sadr Pro. 20th October 1858) affords additional reason to believe that the late Sadr Court had not adopted any such general proposition as that contended for in this case, viz., that the prohibition against suing in the ordinary Courts was confined to cases in which the title of the claimant as Inamdar was in dispute, for in those proceedings the Court say "that the prohibition to the Courts to interfere with claims to Inams, imposed by Reg. 4 of 1831, extends to the produce of the Inams, it being obvious that the value and uses of an Inam are bound up altogether in its produce, and that to leave the holder the bare title and take away from him the profits accruing therefrom would be to nullify the provisions of the Regulation and to deprive the Inamdar of the protection and privileges designed thereby to be secured to him. There may, however," the Court observe, "be such a divestment by the Inamdar himself of his right over the produce of his Inam as

1868. June 7. R. A. No. 6 of 1868.

to place it within the range of ordinary personal effects and therefore within the power of the Courts to deal with; for example, should he voluntarily tender produce in discharge of a decree, or should he have sold or pledged it; but such divestment must be special and of actual standing crops or reaped produce and cannot embrace prospective or untangible produce." Now if these observations are correct with respect to the class of Inams included in Regulation 4, which does not prohibit alienations by the Inamdar, they are, a *fortiori* applicable to the class of Inams which fall under Regulation 6 1831, and in the present case, as the Civil Judge has observed, the plaint negatives any such divestment of the produce as is above referred to. In that case the Sadr Court held that the Civil Courts had no authority to direct the appropriation of the produce of the Inam lands towards the satisfaction of a decree against the Inamdar, and in the present case, we hold on the same principle that the Civil Courts have no authority to enforce the claim of the Inamdar to receive from the defendant 3 years' produce of the Inam land, the same being part of the emoluments annexed to an office, all claims to the enjoyment of which are declared to be adjudicable by the Collector of the District. We therefore confirm the decree of the Civil Judge, but, as the respondent did not appear, there will be no costs.

Appeal dismissed.

Appellate Jurisdiction (a)

Civil Petition No. 123 *of* 1868.

KONDARAJU VENKATA SUBBAIYA..................*Petitioner.*

RAMAKRISHNAMMA *alias* URUP-KRISTNAIYA and another...... } *Counter Petitioners.*

In order to keep a decree alive it is, under Section 20 of the Limitation Act, not necessary that the application for execution should be made with the intention of enforcing the decree at that time. All that the section requires is, that some proceeding shall have been taken to enforce the decree or to keep it in force within three years.

THIS was a petition against an order of J. R. Cockerell, the Civil Judge of Nellore, dated 7th February 1868. 1868. *June* 19. *C. P. No.* 123 *of* 1868.

Parthasarady Aiyangar for the petitioner.

The Court delivered the following

JUDGMENT :—This was an application for execution, which was rejected by the Civil Judge as barred by lapse of time.

The application was made in December 1867 ; and there had been two previous applications for execution, one on 5th January 1865 and the other on the 18th January 1862. The decree was dated 30th June 1852.

Act XIV of 1859 did not come into operation until the 1st January 1862; and by virtue of Section 21 the 1st application for execution was clearly in time, although nearly ten years after the date of the decree. Then the 2nd application was within three years of the 1st, and the third within three years of the second as required by Section 20 of Act 14 of 1859. But the Civil Judge appears to have considered that the first and second applications were not made *bonâ fide*. Now nothing is said in Section 20 about the *bonâ fides* of the applications ; and all that the Civil Judge meant by saying that they were not *bonâ fide* probably was that they were not really made for the purpose of obtaining process of execution at the time. This possibly may be so. It is not at all events an unreasonable inference from the facts to which the Civil Judge alludes ; but assuming it to be so,

(a) Present : Bittleston and Ellis, J.J.

1868. June 19. C.P. No. 123 of 1868. we think it did not warrant the Judge in treating those applications as not having been made at all, and so shutting out the present application on the score of lapse of time. What Section 20 requires is, that some proceeding shall have been taken to enforce the decree or to keep it in force within three years; and though in the present case there may be ground for supposing that the applications in 1862 and 1865 were not made really for the purpose of then enforcing the decree, there is not (as it appears to us) any ground for saying that they were not made in order "to keep it in force." There is no other way of keeping a decree in force than by some such application, and the use of these words seems to us to shew that the Legislature did not mean to compel a decree-holder to proceed *boná fide* to enforce his decree within three years, under the penalty of being altogether barred by lapse of time. We therefore reverse the decision of the Civil Judge and direct him to dispose of the application on the merits.

Petition allowed.

Original Jurisdiction (a)

Referred Case No. 46 *of* 1867.

C. APPIAH CHETTY against CHENGADOO.

The discharge of a defendant from confinement in jail, in consequence of the plaintiff's failure to pay subsistence money at the rate fixed by the Court, bars a second arrest and imprisonment in execution of the decree.

1868. Jany. 20. R. C. No. 46 of 1867. THIS was a case referred for the opinion of the High Court by H. P. Gordon, the Acting Judge of the Court of Small Causes of Vellore, in Suit No. 215 of 1867.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—We take it that the plaintiff failed to pay the amount of subsistence batta for the unexpired portion of the current month at the rate fixed by the Court.

(a) Present: Scotland, C. J., and Ellis, J.

If so, we are of opinion, that the Acting Judge held rightly that the discharge of the defendant was a bar to a second arrest and imprisonment in execution of the decree.

Appellate Jurisdiction (a)

Regular Appeal No. 62 *of* 1868.

MR. D. W. AUCHTERLONIE............*Appellant.*

MR. CHARLES BILL and another......*Respondents.*

In the case of covenants in restraint of trade the deed of covenant must show a good consideration. The Courts will not enter into the question of the adequacy of the consideration. A covenant giving appellant the exclusive right to convey passengers to and fro on the road between Ootacamund and Metapolliem, is not a contract in general restraint of trade, and therefore is one which the law will enforce.

THIS was a Regular Appeal from the decree of R. G. Clarke, the Acting Civil Judge of Ootacamund, in Original Suit No. 4 of 1868. 1868. *July* 3. *R. A. No.* 62 *of* 1868.

Handley for the appellant, the plaintiff.

O'Sullivan for the respondents, the defendants.

The Court delivered the following

JUDGMENT:—This is a suit for the breach of a covenant not to carry on the business of carriers on the road between Mettapolliem and Ootacamund. The issues recorded properly raise the two points of the defence set forth in the written statement of the 1st defendant, namely, 1st the illegality of the covenant as being in restraint of trade and therefore opposed to public policy, secondly the want of any consideration for the covenant. No witnesses have been examined by either the plaintiff or the defendants, and neither of the documents marked B and C, nor the deposition taken from the plaintiff so far as the almost illegible writing can be deciphered, bear materially as evidence on either of the points. On the first issue, the Civil Judge has given judgment that the

(a) Present: Scotland, C. J. and Ellis, J.

1868. July 3. R. A. No. 62 of 1868. covenant being a contract by deed "cannot be invalidated on the plea of want of consideration, no other motive than the will of the party or parties making the contract being in such case necessary to render it binding." On the second issue, he has expressed the opinion that "the contract is contrary to public policy and the fundamental principles of common law which favor free trade" for the reason apparently that its effect was to deprive visitors to the Hills of the cheaper conveyance between Ootacamund and Coimbatore which the defendants' opposition would afford them; and on this latter ground the decree of the Civil Court dismissing the suit rests.

The substantial objections to the decree raised by the grounds of appeal and argued before us are first, that the deed shows a good consideration for the covenant; and secondly, that the stipulation sued upon is not within the rule of law which vitiates contracts in restraint of the right of individuals to carry on the business of a trade or profession. As to the first objection, the decision of the Civil Judge in favor of the appellant has been given up by his Counsel, and there is no doubt that it is quite untenable. The necessity of a good consideration for a covenant of this nature is a point too well established to admit of argument. The law has been so laid down in a series of decisions over a long period of time. *See* the cases in the notes to *Hunlock* v. *Blacklow*, 2 *Wms. Saunders* 5 *Ed.* 155*b*. 1 Smith, L. C. 340. The Civil Judge was correct in his view of English law (by which the rights of the parties in this case must be decided) as respects the validity of a contract under seal although made without a legal consideration. The general common law rule no doubt is so, but it is inapplicable to contracts in restraint of trade for the special reason that every restraint of trade is presumably bad in the eye of the law and the presumption must be rebutted by its being made to appear that the contract is fair and reasonable, and for that purpose a good consideration is essential.

Then does the deed show a sufficient consideration? On behalf of the respondents it has been contended that

1868. July 3. R. A. No. 62 of 1868.

it does not, because it is not an assignment of the good will of the business of carriers but simply of the premises and stock in and with which the business had been carried on. But, we think, this contention is unfounded. The recitals in the deed, as well as the covenant by the 1st defendant and the other assignor to use their endeavours to secure their customers to the plaintiff's company, conclusively show that the money agreed to be paid was the consideration for the good will of the business of carriers as well as the business premises and stock; and the amount is a good deal in excess of the value of the trade stock specified in the deed. How much of this excess may be on account of the land and buildings mentioned in the deed does not appear, but we can have no doubt that the money and the covenant in regard to the security and future conduct of the business were severally a consideration in part, one for the other, and into the extent or adequacy of the consideration it is not for us to inquire. As said in the judgment of the Court in the case of *Hitchcock* v. *Coker* (*in error*) 6 Ad. and Ell. 457, which settled the law on this point "it is enough that there actually is a consideration for the bargain and that such consideration is a legal consideration and of some value" and that appears here.

The determination of the appellant's second objection depends upon the question whether the facts recited in the deed show the stipulation in question to have been fair and reasonable with respect to the covenantors. and the public interests. It amounts simply to a contract by the vendors of the property and good will of the business, that they will not carry on the business of carriers at the same place and was the means by which a saleable value was given to the good will of the business. So partial a restraint is not really adverse to the interests of the public at large. The giving validity to such contracts " offers" to use the words of Parke B in *Mallan* v. *May* (11 Mee and Wels. 666) "an encouragement to trade by allowing a party to dispose of all the fruits of his industry" and similar contracts have been upheld. *See Leighton* v. *Wales* (3 Mee and Wels 545.) The effect may be as in this instance to deprive a portion of the public of a present tem-

1868. July 3. R. A No. 62 of 1868.

porary gain resulting from the covenantors' competition, but contracts of the kind by giving a real marketable value to the goodwill of an established business operate as an additional inducement to individuals to employ their skill and capital in trade, and thus tend to the advantage of the general public interest, provided of course that the limits of the restraint are not in excess of what is reasonable to secure the enjoyment of the good will sold.

Now of the reasonableness of the extent of the stipulation in the present case we have no doubt. The general principle recognised in *Hitchcock* v. *Coker* and *Mallan* v. *May* is that the restraint must not be larger and wider than the protection of the party with whom the contract is made can require. Here it is limited to the road over which the covenantors carried on the business, and the continuation of that road between Mettapolliem and Coimbatore. In effect the stipulation is little more than that the covenantors will not carry on the same kind of business at the same place. Clearly, therefore, the restriction in regard to space is perfectly reasonable. The stipulation's it is true, is not limited to the carrying on of the business by the Indian Carrying Company themselves, nor to any time short of the life of the covenantors. But that is no valid ground of objection when the restraint is in other respects reasonable. For this the cases of *Hitchcock* v. *Coker*, *Pemberton* v. *Vaughan* (10 Q. B. 87) and *Elves* v. *Croft* 10 C. B. 241 (19 L. J. C. P. 385) are express authorities.

For these reasons we are of opinion that the covenant sued on is a valid one. The decree of the Civil Court must therefore be reversed but to enable us to pass final decree it is necessary to remit the case to the Civil Court for a finding on the following issue after hearing all the admissible evidence which may be adduced by either of the parties. What amount of damages had the Indian Carrying Company sustained at the institution of the suit by the breach on the part of the 1st defendant of the stipulation in the covenant?

As against the 2nd defendant, no liability has been shown and the suit must be dismissed.

Suit remanded.

Appellate Jurisdiction (a.)

Criminal Petition No. 24 *of* 1868.

SUBHARA'YA MUDALI.....................*Appellant.*

A prisoner who was about to be committed to the Session Court presented to the Magistrate a list of witnesses whom he desired to have summoned to give evidence on his behalf at the trial, and on being asked by the Magistrate why he desired to summon the witnesses, the prisoner declined to state his reason.

Held, that the Magistrate was at liberty to decline to summon the persons named in the list on the prisoner declining to satisfy him that they were material witnesses; but the Magistrate ought to have fixed the amount which he considered necessary to defray the cost of the attendance of the persons named, and intimated to the prisoner his readiness to issue summonses on that amount being deposited.

The High Court called for the record for the purpose of seeing, whether any of the persons named in the list were likely to be able to give material evidence.

1868. *March* 2. *C. P. No.* 24 *of* 1868.

APPEAL on behalf of the prisoner against the sentence of the Session Court of Chingleput. The prisoner was charged under Sections 193 and 181 of the Penal Code with having given false evidence in a stage of a judicial proceeding, and also made a false statement on oath to a public servant who was authorised by law to administer such oath. It appeared that in the course of a judicial inquiry conducted by the Acting Sub-Collector of Madras under the provisions of Regulation IX of 1822 upon a complaint which had been made against the Tahsildar of Conjeveram, the prisoner was examined as a witness and made certain statements which were found to be false.

The following is an extract from the Calendar of the Session Court :—

" When the Acting Joint Magistrate had completed the preliminary inquiry in this case, and was about to commit it to this Court, the prisoner tendered to the Acting Joint Magistrate a list of witnesses whom he demanded should be summoned as witnesses for his defence before this Court. This list includes the names of the Acting Joint Magistrate and his Sheristadar, and nearly all the Gomastas and Clerks in his establishment, the Acting Session Judge and his Court Sheristadar and some Peons on his establishment, the District Munsifs of Conjeveram

(a) Present: Scotland, C. J. and Ellis, J.

1868. March 2. C. P. No. 24 of 1868.

and Caranguli, and several Clerks in their Courts, the Chingleput Taluq Police Inspector, Head and Deputy Constables, some Vakeels of the High Court in Madras, and Clerks of the Collector's office at Sydapet. The Acting Joint Magistrate then, very properly exercising the discretion vested in him by Section 228 of the Criminal Procedure Code, called upon the prisoner to state why he desired to summon those witnesses, and the prisoner refused to state his reasons. Before this Court he explains that he wanted to examine them all to show that the Acting Joint Magistrate entertains enmity against him. The Acting Joint Magistrate declined to summon the witnesses named by the prisoner. Prisoner admits that he did not produce any money to defray the expenses of the witnesses he wanted to have summoned, but says he was ready to do so if called on by the Acting Joint Magistrate. There is nothing to shew that the inquiry was not conducted by the Acting Joint Magistrate with the most perfect fairness and regularity."

The prisoner appealed on the grounds that the conviction was not justified by the evidence and that the prisoner was unable to establish his defence by reason of the refusal of the Acting Joint Magistrate to issue summonses for witnesses to give evidence on his behalf.

Miller, for the Appellant.

The Court delivered the following

JUDGMENT:—There is no validity, we think, in the legal objections taken first, that the statement of the prisoner was not made in a judicial proceeding, or before a public servant authorised to administer an oath within the meaning of the Sections on which the charges are framed; and secondly, that the materiality of the statement to the matter of the inquiry before the Sub-Collector does not appear.

We are also of opinion that the evidence now on record in the case is quite sufficient to support the charge of the wilful falsity of the prisoner's statement in the inquiry. But it is urged that the prisoner has been unjustly denied the opportunity of examining witnesses in

his defence by the refusal of the Committing Magistrate and Session Judge to issue summonses to the persons named by the prisoner. We must see that there is no just ground for this objection, for if there is, we must afford the proper redress.

1868.
March 2.
C. P. No. 24
of 1868.

The Magistrate (entertaining the opinion he did) was clearly at liberty to refuse to summon the persons named in the list presented at the close of the inquiry before him, on the prisoner's declining to satisfy him that there were grounds for believing that they were material witnesses. But he ought at the same time to have fixed the amount which he considered necessary to defray the cost of the attendance of the persons named, and intimated to the applicant his readiness to issue summonses on that amount being deposited, and so far as we have at present the means of knowledge that may have been done. Further, we cannot say that the Session Judge acted in any way improperly in declining to entertain before the trial the prisoner's petition with reference to the refusal of the Magistrate, or in not issuing summonses in the course of the trial.

Therefore had nothing appeared before the Court as to any of the persons on the list being likely to give material evidence, except the prisoner's general statement, we should have thought that no ground had been shewn for the Court's interference. There are, however, statements of the 5th witness for the prosecution relating to Mr. Burnell and Somasoondra Chetty, an employé in the Collector's office, which it is contended in fairness entitled the prisoner to the testimony of those witnesses.

Without for a moment supposing that there is the least foundation for the imputations made by the prisoner, we think it necessary, to a satisfactory determination of the objection, that the deposition of the 5th witness should be returned to the Court, and that at the same time the Court should be informed whether the Magistrate intimated to the prisoner his readiness to issue summonses on a certain amount being deposited for the necessary expenses of attendance as required by Section 228 of the Criminal

1868. March 2. C. P. No. 24 of 1868.

Procedure Code, as also of the reasons of the Session Judge for not permitting summonses to any of the persons named to be issued on the trial.

The record must be called for, but it is not necessary to require an English translation of more of it than the deposition of the 5th witness for the prosecution.

[Note.—Upon the further hearing of the case, the High Court directed the evidence of one of the persons named in the list presented by the prisoner to be taken and returned to the Court, and upon a consideration of the whole case the conviction was affirmed.]

Appellate Jurisdiction (a)

Special Appeal No. 6 of 1868.

GNA'NABHA'I.........................*Special Appellant.*

C. SRI'NIVA'SA PILLAI..........*Special Respondent.*

A voluntary transfer of property by way of gift, if made *bonâ fide*, and not with the intention of defrauding creditors, is valid as against creditors.

The Hindu and English Law on the subject discussed.

1868. May 1. S. A. No. 6 of 1868.

THIS was a Special Appeal against the decree of R. Davidson, the Officiating Civil Judge of Tanjore, in Regular Appeal No. 255 of 1866, reversing the decree of the Principal Sadr Amin's Court in Original Suit No. 5 of 1865.

Srinivása Cháriyár, for the Special Appellant, the second defendant.

Sanjiva Row, for the Special Respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—This is a suit by a judgment creditor to invalidate a voluntary transfer of certain Government securities of the value of rupees 25,000 made by the judgment debtor to his wife (the 2nd defendant,) and to establish the plaintiff's right to take such securities in execution. The material facts found by both the Lower Courts are that the plaintiff obtained a decree in a suit brought in 1859 for the amount of a simple money bond executed by the 1st defendant in May 1858, and that

(a) Present: Scotland, C. J. and Collett, J.

about a year after the execution of the bond, and a few months before the institution of the suit, the securities in question were transferred by endorsement to the 2nd defendant without any legal consideration or notice to third persons, and she had since drawn the interest due thereon. It is also found by the Original Court that the transfer was a *bonâ fide* transaction; but it does not appear distinctly what conclusion the Lower Appellate Court came to on this point, although several circumstances are alluded to in the judgment of the Court which bear very materially upon it. The Civil Judge considered the fact of the transfer having been made after the 1st defendant had incurred the debt to the plaintiff without notice or provision for payment of that debt, enough to render it a fraud on the plaintiff, and on that ground he has reversed the decree of the Original Court and passed a decree in the plaintiff's favor.

We are of opinion that this decision of the Civil Court is not maintainable. Assuming that the Court will find as the Original Court has done (for a distinct finding on the point must be required) that the transfer was a *bonâ fide* disposition of the securities to the 2nd defendant, and not a mere blind or really with the intention to defraud the plaintiff of the amount of his debt, it is, we think, as valid against the plaintiff as against the 1st defendant, the donor. According to the Hindu Law, the possessor of property, whether movable or immovable, may make as effectual a transfer of his right and interest by a gift as by a sale or other disposition. It makes no distinction that we know of in favor of creditors between a voluntary transfer and one for a valuable consideration. In truth the Hindu Law does not, we believe, contain any special prohibitory provision relating to the protection of creditors generally. There are several texts forbidding gifts to such an extent as to deprive a man of the means of fulfilling his sacred obligation to provide maintenance for the members of his family. These are to be found collected in *Colebrooke's Digest, Chap.* 4, and some of them are relied upon in the Pundits' opinion quoted in argument from 2 *Mack H. L.* 248. But whatever may be heir effect, they are in reason inapplicable to the gift in

1868. May 1. S. A. No. 6 of 1868.

question, for its very object and effect, if real, was to secure the money for the benefit of the donor's wife and family if they had any.

The transfer of the securities then is not of any less validity in law as against the plaintiff by reason of its being a voluntary gift, and in order to vitiate it, fraud must be shewn as is necessary when it is sought to invalidatea transaction in which a valuable consideration has passed between the parties. Now nothing definite appears to be propounded by the Authorities on Hindu Law in regard to the effect of particular acts or intents as proof of fraud. The primary text of *Menu* (*Chap.* 8, *Cl.* 165), is perfectly general: "When the Judge discovers a fraudulent pledge or sale, a fraudulent gift and acceptance, or in whatever other case he detects fraud, let him annul the whole transaction," and the passages cited in the course of the argument from the *Vyavahára Mayúkha, Chap.* 4, *Section* 10, *Cl.* 6, the *Smruti Chandrika by Kristnaswámi Iyer, Chap.* 9, *Sec.* 1, *Cl.* 11, *and Elberling's Treatise, Sec.* 363, *p.* 122, are also in general terms. We may look therefore to the English decisions relating to conveyances fraudulent as against creditors, and be guided in the consideration of this case by the principles they lay down.

It is clearly a settled rule, as is pointed out in the judgment in the recent case before this Court, *Sankappa* v. *Ramayya* 3, *Madras High Court Reports* 231, that the mere intention to hinder or defeat the realization of a debt by execution is not a fraud against the creditor which affects a transfer of property for a valuable consideration in other respects *boná fide,* and that no doubt is a sound rule which may be applied generally to similar cases here. The law, however, is not the same in regard to voluntary transfers. They operate to reduce the means of the debtors by whom they are made, and the rule is that when they are shown to have that effect to such an extent as to justify the inference of an intention to hinder, delay, or defraud creditors, they are *mala fide* and void. The *boná fides* of the particular transaction is the point for consideration, but it

turns on the evidence in each case as to the motive and intention of the debtor in regard to his creditors.

Now this rule may also, we think, be fitly made applicable to voluntary transactions between natives; but it is necessary to guard against a too limited application of the terms delay and hinder; against its being supposed that the mere prevention of proceedings on the part of a creditor against the particular property which is the subject of the voluntary gift is sufficient to make it void. In the use of those terms, the rule follows the language of the 1st Section of the Statute 13, Elizabeth Cap. 5 (of no force as respects transactions between Hindus) which provides that the intent to "delay, hinder, or defraud" creditors shall vitiate the several transactions mentioned in the Section, and at one time much difference of judicial opinion existed as to the application of the rule. The more recent decisions, however, have settled the principle of its application. Their effect appears to be, that a voluntary disposition of property may be valid, although the person making it is at the time in debt, and that in each case the validity or invalidity of the transaction depends upon the question, whether the circumstances connected with the debtor's state of indebtedness support the presumption that he had the intent to deprive the objecting creditor of the means of recovering his debt—in effect the presumption of fraud.—*Holmes*, v. *Penny* 26, *Law Journal, Chan.* 179, *Thompson* v. *Webster* 28 *Law Journal, Chan.* 702, *and* see 2, *Spence's Chancery* 887 *note*. There must appear to be intentional fraud in the hindrance or delay that is caused to the creditor. Otherwise, a voluntary transfer of particular property in the ordinary course of business which causes some delay to a creditor in proceeding to recover his debt (a not uncommon occurrence) might be vitiated as fraudulent, although the debtor had sufficient other means available to the creditor.

This principle of fraud in accordance with the general Hindu Law is, in our judgment, the proper principle applicable to the present case and all cases of a similar nature. In the case of a transfer for valuable consideration, creditors who can only look to the property as available in execu-

1868. May 1. S. A. No. 6 of 1868.

tion cannot object to the transfer as fraudulent, if it has been made and accepted *bonâ fide*, that is, with the honest intention of passing the property, if the transaction has been real and not a fictitious contrivance to deceive as to the right of property. So again in the case of a voluntary transfer, the *bonâ fides* of it with reference to the intention of the debtor is the point for consideration. In every such case we think the proper question to be considered is whether the circumstances in evidence taken together lead reasonably to the conclusion that the real motive and intention of the transaction was to deprive the creditor of the means of obtaining payment of his debt from the debtor's property generally. If so, the disposition is fraudulent and void to the extent of the debt due to the creditor by whom it is impeached.

No general rule can be laid down as to the nature or extent of the evidence which should be acted upon. Being a question of intention, each case must necessarily be decided on the particular evidence offered in it as to the acts of the parties and the position in which they stood to each other, the amount of the debt, the means possessed by the debtor, and the other circumstances shewn to be connected with the transaction.

On this view of the rule of law, it is obvious that the ground on which the Civil Court has decided the case is not alone sufficient to invalidate the transfer in question, and for the reasons given that Court must be required to return a finding on the issue:—Was the transfer of the securities really made with the fraudulent motive and intention of depriving the plaintiff of the means of recovering his debt from the 1st defendant's property generally?

It is accordingly hereby ordered that the foregoing issue be, and the same hereby is, referred to the Lower Appellate Court for trial upon the evidence already recorded in the suit, the finding thereon together with the evidence to be returned to this Court within six weeks from the date of receiving this order.

Appellate Jurisdiction (a.)

Special Appeal (Miscellaneous) No. 73 of 1868.

LAKSHMAMMA and another *against* VENKATARA'GAVA CHA'RIA'R.

The petitioners, as widow and adopted son of a decree-holder, applied by petition to the District Munsif for execution of the decree on the 17th June 1864.

The District Munsif made an order stating that execution would not be granted unless the petitioners obtained a certificate from the District Court under Act XXVII of 1860. In August 1864, an application was made for a certificate to the Civil Court, and an order was made refusing the application, and the order was affirmed on appeal. A second application was made for execution in July 1867.

Held, that the right of the petitioners to obtain execution was barred by Section 20, Act XIV of 1859.

Quaere, whether a Suit on the decree could be maintained.

THIS was a Special Appeal against an order of J. W. Breeks, the Acting Civil Judge of Chittoor, dated the 19th December 1867. 1868. *May* 8. *S.A.(M.)No.*73 *of* 1868.

Srinivása Cháry, for the Petitioners.

Párthasarathy Aiyangár, for the Counter-petitioner.

This petition coming on for hearing, the Court delivered the following

JUDGMENT:—This is an appeal from an order of the Civil Court of Chittoor affirming the order passed by the District Munsif on the dismissal of the appellant's application for execution of the decree in the Suit No. 249 of 1852 on the ground that his right to proceed was barred by Section 20 of the Act of Limitations.

The material facts appear to be that on the death of the plaintiff in Suit No. 249 of 1858 (the decree-holder), the appellants claimed to enforce the decree as his widow and adopted son, and made an application by petition to the District Munsif's Court for execution on the 17th June 1864. The District Munsif thereupon passed an order stating that execution would not be granted unless the petitioners obtained a certificate from the District Court under

(a) Present: Scotland, C. J. and Ellis, J.

1868. May 8. S.A.(M.) No.73 of 1868.

Act XXVII of 1860. Before this order, the widow on behalf of her adopted son had instituted a Suit No. 3 of 1864 in the Civil Court against her father and her deceased husband's relations, in which she obtained a decree on the 2nd February 1867 in favor of the right of her adopted son to certain immovable property of his adoptive father. She also made an application for a certificate under Act XXVII of 1860 in August 1864, which was rejected, and she unsuccessfully appealed against that rejection. The decree in No. 3 of 1864 was appealed from, and in the appeal a razinamah was filed and a decree passed in accordance therewith. Nothing, however, was done with respect to execution on the decree in No. 249 of 1852 between the 17th June 1864 and July 1867 when the order now appealed from was made.

Clearly there has been no proceeding to enforce the decree or to keep it in force within three years, and Section 20, of Act XIV of 1859 is a bar to the issuing of process of execution, unless the District Munsif's order of the 17th June 1864 had the effect of making the then application a continuing one. With the desire of securing, if possible, what appears to be a just claim, we have looked to see whether it was admissible to construe the order as a recognition of the right of the applicants as representatives to execution; and a stay of the necessary process until the required certificate should be produced, in which case it might perhaps be considered that there had been a continuing proceeding at all events until the subsequent unsuccessful proceeding for a certificate came to an end. But we are unable so to construe the order. It appears to be simply a rejection of the application on the ground that the applicants could not be recognised as representatives except on the production of the certificate. The applicants might have renewed their application for execution after the failure to obtain the certificate, and, if again unsuccessful, might have appealed as they have now done. We must, therefore, dismiss this appeal but without costs. It may be that a suit on the decree will lie notwithstanding the enactment in Section 11 of Act XXIII of 1861, the effect of the District Munsif's order being to deny the right of the widow and adopted son to

be made parties in order to execute the decree. We, however, give no opinion on the point, and the case of *Buddu Ramaiya* v. *C. Venkaiya*, 3, *Madras High Court Repotts* 263 (in accordance with which this appeal is entertained) certainly bears against the right of suit. 1868. *May* 8. *S.A.(M.)No.*97 *of* 1868.

Appeal dismissed.

Original Jurisdiction (a.)

In the matter of the Petition of NARAINASAMI PILLAI *under Section* 84 *of the Registration Act XX of* 1866.

The only two things which are absolutely required by Section 21 of Act XX of 1866 as conditions without compliance with which registration is prohibited are, first, that the instrument shall contain a description of the property sufficient to identify it, and, secondly, that if the instrument contains a map, a copy or copies of the map shall accompany the instrument when presented for registration. The other provisions of Section 21 are directory only. The circumstance, therefore, that the description of the parcels in the instrument does not specify the registration district, or sub-district, or division, or village in which the property is situate, or the former occupancy, is not alone sufficient to disentitle a party getting an instrument registered, if the description in the instrument is sufficient to identify the property.

Upon a petition under Section 84 of Act XX of 1866, the District Court is bound to ascertain whether the description is sufficient to identify the property notwithstanding the failure to supply some particular mentioned in Section 21, or the rules.

It is not necessary that the executing party should attend in Court, pursuant to notice served under Section 84, in order to authorise the Court to order the registration of the instrument. Under Section 84, the Court is not bound to direct registration of the instrument even if satisfied that the requirements of the law have been complied with, though in the exercise of this discretion the Court ought not to refuse registration unless very clearly satisfied that the registration will work injustice.

The verified statement, in the petition for registration, of the execution of the instrument is not, when the executing party fails to appear in Court, sufficient proof of the execution, in order that the Court may direct registration.

Semble, the words "the revenue officer in whose jurisdiction the person whose attendance is desired may be," in Section 40 of the Act, point to the chief revenue officer of the district, viz., the Collector, or, if in any defined sub-district the sub-Collector, such sub-Collector has all the powers of a Collector.

IN the matter of this petition, the following Judgment, in which the facts sufficiently appear, was delivered by 1868. *May* 26.

(*a*) Present: Bittleston, J.

1868. May 26.

Bittleston, J.—The first question which I have to consider is whether the requirements of the law have been complied with on the part of the petitioner, so as to entitle the document to registration.

Both the Registrar of Madras and also the Registrar General on Appeal have stated in their reasons for refusing registration that the description of parcels in the mortgage deed presented to them for registration is insufficient to satisfy the provisions of the Act and of the Rules 57 and 58 made under the Act. The Registrar General specifies the points in which the description is defective.

One of the parcels is described in the deed, thus : " As also the bungalow and garden in the Luz bearing Nos. 3 and 4, situated in the 4th Division of Police of the Madras District, formerly occupied by H. Bill, and at present occupied by Mrs. Doctor Sherman, and bounded on the west by a road, south by a house formerly belonging to Mr. R. Dasilva, and at present to Singara Mudalli, east by a ane, west by a house belonging to Mr. C. Dasilva, containing one cani, &c., as per the conveyance in my favor, dated 11th March 1865," and the objection taken to that description is that the Luz is not one of the 36 divisions or villages named in amended Rule 57. Now whether that is or is not a fatal objection, wholly disentitling the petitioner to have the document registered, depends upon the proper construction of Section 21 of the Act. That Section provides as follows: " No instrument relating to immovable property shall be accepted for registration unless it shall contain a description of such property sufficient to identify the same. Houses in towns shall be described as situate on the north or other side of the street or road (mentioning it) to which they front and by their existing and former occupancies, and by their numbers, if the houses in such street or road are numbered. Other houses and lands shall be described by their name, if any, and as being in the territorial division in which they are situate, and by their superficial contents, the roads and other properties on which they abut, and their occupancies, and also, whenever it is practicable, by reference to a Government

map or survey. No document containing a map or plan of any property comprised therein shall be accepted for registration, unless it be accompanied by a true copy of the map or plan; or, in case such property shall be situate in several sub-districts, by such number of true copies of the map or plan as shall be equal to the number of such sub-districts, and in case the property shall be also situate in several districts by such further number of true copies of the map or plan as shall be equal to the number of such districts."

1868. May 26.

Now I agree that Rule 57, having been made by the Registrar General, approved by the Local Government and published in the Official Gazette pursuant to Section 80 of the Registration Act, has the same force as if it had been inserted in the Act, and that therefore Section 21 for the purposes of this case must be read as if in lieu of the words "in the territorial division in which they are situate," The words of the 57th Rule had been inserted, and the Section had required a description of the property as situate "in the district of Madras, and in one or other of the divisions or villages" in that rule mentioned; of which certainly the Luz is not one. Therefore to comply strictly with Section 21, and the Rule 57, the property ought to have been described as situate in the district of Madras and in the division or village of Mylapore; but the question is whether the omission so to describe it prevents its registration. In my opinion it does not. Upon carefully considering Section 21, it appears to me that the two things which by that Section are absolutely required as conditions, without compliance with which registration is prohibited, are, 1st, that the instrument shall contain a description of the property sufficient to identify it; and, 2ndly, that if the instrument contains a map or plan, then a copy or copies of that map or plan shall accompany the instrument when presented for registration. The other provisions of the Section are, I think, directory only, indicating the intention of the Legislature as to the kind of description ordinarily to be required, but not importing the absolute necessity of strict compliance therewith in order to entitle an instrument to registration, if the des-

1868. May 26.

cription which is given be sufficient to identify the property. It seems to me improbable that the Legislature should have intended so strictly to define the particular method of description when the consequences of so holding are considered. Those consequences may be illustrated by the circumstances of the present case. The executing party, who by the terms of the instrument appears to have received 12,000 rupees from the petitioner, fails to appear when summoned to the Registration Office, and his attendance not being procurable, the instrument cannot be altered however slight the variation required so as to make the description of the parcels comply with the rule. The instrument therefore cannot be registered, and by the operation of Section 49 of the Act, it becomes waste paper in the hands of the party who has advanced his money upon it. The absence of negative words in that part of Section 21, which mentions the particulars of the required description, confirms me in the view that that part of the Section is directory only; and I refer to the case of *Cole* v. *Green* (7 Scott's N. R. 682, 704) as an authority for the construction which I have put upon the Section.

A subordinate registering officer may consider himself bound, and perhaps may be justified, in obedience to the orders of his superiors, in not passing for registration any document which does not comply with the rules, taking such compliance as the only test which he can recognise, of a description sufficient to identify the property; but in this Court at all events upon a petition under Section 84 it seems to me that I am bound to ascertain whether the description is sufficient to identify the property, notwithstanding the failure to supply some particular point mentioned either in Section 21, or the rules.

In the present instance there can be no doubt, and it is not disputed that the description is sufficient to identify the property, and if in registering the document the registering officer should make a note in the margin against the word " Luz" "in the district of Madras and division or village of Mylapore," then the registration of the instrument will be accompanied with all the information which

either the Legislature or the Registrar General has deemed desirable. 1868. May 26.

The observations above made seem to me also to apply to the objection taken by the Registrar General to the description of another piece of property also mortgaged by this same instrument, and described as " the house and ground situated at Little Mount Guindy, and occupied at present by Apothecary Stephenson, and bounded on the north by the river, on the south by the Little Mount Church, east by a lane and Richardson's house, west by a lane and Johannes' house, known as Crump's house, and measuring in length 241¼ ft., and in breadth 240 ft., as per the conveyance in my favor, dated 10th September 1866." The objection is that under Rule 58 this property should have been described as situated in the registration district of Chingleput and in the registration sub-district of Sydapet, so that the very form of objection shows that the description given is sufficient to inform the registering officers in which registration district and sub-district the property is situate. Further it is objected that under Section 21, the name of the former occupant should have been given; and (assuming the Little Mount Guindy to be a town) so it should, if exact compliance with the terms of that Section was absolutely essential. But the very mention of this as one of the required terms of description goes far, I think, to show that exact compliance with those terms was not intended to be a condition precedent to the right to registration, a description " by their existing and former occupancies is required as to houses in towns and as to other houses and lands a description by their occupancies," which means, I suppose, existing occupancies," so that if the Little Mount Guindy be not a town, and I don't imagine that a Madras Jury would find it to be so, the description by the existing occupant Mr. Apothecary Stephenson appears to be sufficient. But suppose the name of the former occupant could not be ascertained, or not, without great trouble? the present occupant may have been in possession for many years, and previously for many years the property may have been unoccupied. Must there be a laborious antiquarian re-

1868. May 26.

search into the remote history of the property for the purpose of ascertaining the name of an old tenant in order to entitle a purchaser or mortgagee to have his deed registered? I observe that the form of petition given in the Schedule to the Act contains a statement that the petitioner has complied with the requirements of the Act *so far as it has been possible for him to do so,* which also, I think, favors the view I have taken of Section 21.

Having thus arrived at the conclusion that the description of the property in the instrument is sufficient for identification, there is not in this case anything to prevent the Court from directing that it should be registered.

In order to enable the registering officer to register the attendance of the executing party or his representative, assign or agent, is in general necessary under Section 36 of the Act; but it is not, in my opinion, necessary that the executing party should attend in Court pursuant to the notice served upon him under Section 84 in order to authorise the Court to order the registration of the instrument; for Section 36 is in express terms made subject to the provisions of Section 84. On the other hand, the Court is not bound under Section 84 to direct registration of the instrument, even if satisfied that the requirements of the law have been complied with. The words are " the Court may, if it shall think proper," but in the exercise of his discretion, the Court ought not, in my opinion, to refuse registration unless very clearly satisfied that the registration will work injustice; for, on the one hand the refusal of registration shuts out the party claiming under the instrument from all remedy, whilst on the other the registration of the instrument does not prevent the executing party, if sued upon it, from making any defence which would otherwise have been open to him.

The only remaining question is whether the verified statement in the petition of the execution of the document is sufficient when the executing party fails to appear; and I think it is not. In such cases the same course should be pursued as when a defendant in a suit does not appear, and the case is heard *ex-parte.* The execution of the

instrument must be proved on solemn affirmation by the petitioner or a witness who was present at the execution, and the deposition should be taken down and kept with the record. Upon the point so fully stated by the Registrar General in his reasons for refusing registration in this case, viz., the power to compel the attendance of the executing party before the registering officer, it is not necessary for me in this case to say anything, but I cannot doubt that under Section 40 of the Act the very same power exists of compelling the attendance of an executing party summoned before the registering officer, as that which the law gives for compelling the attendance of a witness before a Civil Court. The difficulty seems to be, who is the Revenue Officer by whom the process for enforcing attendance is to be issued and served, and I think that the words "the Revenue Officer in whose jurisdiction the person whose attendance is desired may be," mean the chief revenue officer of the district, viz., the Collector, or, if in any defined sub-district, a Sub-Collector has all the powers of the Collector, then, in that sub-district the Sub-Collector.

In my opinion the registering officer is the person who is to exercise a discretion as to the extent to which the process for compelling attendance shall be carried, viz., 1st, whether a warrant to apprehend the person should be issued, and, 2nd, if that process failed, whether an attachment of his property should take place under Section 159, and the Revenue Officer is the person to issue and serve the process.

The inability therefore to compel the attendance of Mr. Bowie alleged by the District Registrar does not, in my opinion, exist; but I agree with the Registrar General that the practical difficulties, which in this Presidency alone appear to arise in the way of executing compulsory process, formed a very good reason why the Registrar in the exercise of his discretion should refuse to make the attempt; and the matter is not of the same importance if it be correctly held that upon petition to this Court the non-attendance of the executing party either at the Registration Office or in the Court is not a sufficient ground for refusing registration.

1868. May 26. Upon proof of the execution of the document the order will go for its registration.

Appellate Jurisdiction (a)

Special Appeal No. 144 *of* 1868.

KRISHNA........................ *Special Appellant.*

RA'YAPPA SHANBHA'GA......... *Special Respondent.*

In a suit to establish a right of water and for damages for interruption of the same the facts were:—Plaintiff and defendant by agreement between them constructed a dam across a main channel, and from thence a smaller channel was made through the land of the defendant to the plaintiff's land, by means of which it was agreed that the plaintiff should be at liberty to irrigate his fields. This agreement was acted upon for a long course of years.

Held, that the agreement was not a mere parol license revocable at the pleasure of the defendant, but an agreement which created a right of easement, unlimited in point of time, to the use of the water by the plaintiff, and imposed upon the defendant the corresponding duty of allowing the accustomed supply to flow.

A mere license differs in its effects from a license coupled with the creation of an interest. The former is revocable, but the latter is subject to the same incidents, and is as binding and irrevocable as any other contract, gift, or grant.

The law in this country does not require that any agreement between natives, whether in regard to the transfer or creation of an interest in land, or otherwise, should be in writing; nor does it distinguish between agreements under seal and by parol.

Kesava Pillai *v.* Peddu Reddi and others (1, Madras High Court Reports 258) distinguished.

1868. June 8. S. A. No. 144 of 1868. THIS was a Special Appeal against the decree of T. Muthusami Aiyar, the Principal Sadr Amin of Mangalore, in Regular Appeal No. 27 of 1866, reversing the decree of the Court of the District Munsif of Mangalore in Original Suit No. 200 of 1862.

Sanjiva Rau, for the Special Appellant, the plaintiff.

Ráma Rau, for *Párthasaradhy Aiyangár,* for the Special Respondent, the fourth defendant.

The Court delivered the following

JUDGMENT:—In this case the admitted facts are that the plaintiff and defendant by agreement between them con-

(a) Present: Scotland, C. J. and Collett J.

structed a dam across a main channel, and from thence a smaller channel was made through the land of the defendant to the lands of the plaintiff, by means of which it was agreed that the plaintiff should be at liberty to bring water for the irrigation of his fields. This agreement has been executed and acted upon for a long course of years, and the only matter of fact upon which the parties were at issue was whether the privilege of using the water extended to the plaintiff's fields Nos. 1 and 2, or was limited to his other fields, and both the Lower Courts have found upon the evidence afforded by long continued usage that the two fields in question were included in the agreement. The case is thus simply one of an agreement between the parties, and no question of title by prescription arises. The Munsif upheld the agreement, and awarded damages for the loss caused by the defendant having obstructed the flow of water to the two fields in question. The Principal Sadr Amin on the contrary held that the right claimed by the plaintiff was in the nature of an easement, and that a special grant in writing was essential to its acquisition, and that the agreement in this case was a mere parol license revocable at the pleasure of the defendant, and for this he relied on the case reported in 1, *Madras High Court Reports*, 258. We are clearly of opinion that the Principal Sadr Amin is in error and has been misled by some general expressions to be found in the judgment referred to. Without saying how far we should have concurred in the decision in that case, it is sufficient to observe that that was a case of an arrangement between a landlord and his tenant as to something to be done on his own land, and cannot govern a case like the present, of an agreement between strangers for the creation of an easement over one tenement in favor of another tenement. Now a mere license passes no interest nor alters or transfers property in anything, but merely makes an act lawful which without it had been unlawful, and this is in its nature revocable, and even by English Law, a license under seal (provided it be a mere license) is as revocable as a license by parol. But a mere license is something quite different from a license coupled with the creation of an interest. When that exists in a valid form it operates as a contract or a gift or grant, and is subject to the same incidents, and

1868. June 8. S. A. No. 144 of 1868.

is as binding and irrevocable as any other contract, gift, or grant. Here undoubtedly there was an agreement which created the interest or right of easement in favor of the plaintiff on which his cause of action rests. There is nothing in the law of this country which requires that any agreement between natives of this country whether in regard to the transfer or creation of an interest in land or otherwise should be in writing. The necessity under English Law of a grant in writing and under seal for the creation of such an incorporeal right as an easement is due entirely to reasons derived from the Feudal and Statute Law (*Hewlins*, v. *Shippam* 5 B. and Cr. 221), and even where there is no such grant, but the agreement has been executed and expense incurred on the faith of it, a Court of Equity will not permit one party to be guilty of the fraud of depriving the other of the enjoyment of the benefits contracted for by reason of the want of a complete legal title (*Duke of Devonshire* v. *Eglin* 14 Beav 530). In the present case the agreement between the parties being valid by the law of this country, which does not admit of any distinction between agreements under seal and by parol, it gave a right unlimited in point of time to the use of the water, and imposed on the defendant the corresponding duty of allowing the accustomed supply to flow, and having been executed and as respects the fields in question acted upon for a long course of years, ought clearly to be maintained. We need only refer to, that we may not be supposed to have overlooked, the further class of cases in which there is a license by A to B to do something upon B's land, the effect of which may be to narrow or extinguish an incorporeal right or easement enjoyed by A over B's land; such license may even by English law be by parol in respect to things of common or general right, and when once executed, is irrevocable.

The result of our judgment will be to reverse the decree of the Principal Sadr Amin, and to restore that of the Munsif; but before we can finally dispose of this Special Appeal, it is necessary to refer the case to the Principal Sadr Amin to find what amount of damages the plaintiff is entitled to by reason of the wrongful act of the defendant

Appellate Jurisdiction (a)

In the Petition of T. VENKATASAMI NAIK under Section 84, Act XX of 1866.

Where an executing party to a document appears before the registering officer and admits execution, but refuses to sign on the back of the instrument as admitting the execution or do any other act towards its registration, the registering officer cannot, without the order of the District Court under Section 84 of Act XX of 1866, proceed with the registration of the instrument, as the provisions of Sections 66 and 67 could not be complied with. Denial of the receipt of part of the consideration money by the executing party is not a sufficient ground for the District Court refusing registration under Section 84 of the Act.

Where two instruments are contained in the same paper and relate to the same property and are both presented for, and in all other respects are entitled to registration, it is not a sufficient ground for refusing registration that in one of the documents the property is described only by reference to the other.

When any question arises under the Registration Act as to the nature or effect of any instrument, or the sufficiency of any description contained in it, the Court must endeavour to gather from the words used the intention of the parties and give effect to it; and not require, as a condition of registration, that the instrument be drawn up in technical language.

Though in the later of two instruments there are no words directly referring to the first, yet the frame of the documents shewing that the second document should be taken to refer to the first, the second document must be taken to contain a sufficient reference to the first.

Refusal by the executing party to initial an apparent alteration not materially affecting the instrument, unaccompanied by any suggestion that the alteration was improperly made after execution, does not render the document non-registrable.

IN the matter of this petition, the following Judgment, in which the facts fully appear, was delivered by 1868. *9th June.*

BITTLESTON, J.—I am of opinion that the petitioner is entitled under the circumstances of this case to an order for the registration of two documents mentioned in his petition and produced by him in Court.

They are written on one sheet of paper. One is dated 29th November 1867, and is a mortgage debt bond executed by Chinnammal in favor of the petitioner whereby the certificates of a house in Peddunaik's pettah are mortgaged to the petitioner for 150 rupees. The other is dated 17th February 1868, mortgaging also a Collector's

(a) Present: Bittleston, J.

1868. 9th June.

certificate No. 346, issued in the name of Chinnammal for a further loan of 100 rupees. This document refers to the previous loan of 150 rupees, and there can be no doubt that the certificate 346 relates to the same house in Peddunaick's pettah, and was intended to be mortgaged by the earlier instrument, though at that time the certificate had not been issued from the Collector's Cutcherry, for in that earlier document there are the words " as also one deed No. —to be issued in my name at present at the Collector's Cutcherry."

At the Registration Office Chinnammal attended in obedience to a summons and admitted her execution of the documents ; but she refused to attest an interlineation in the earlier bond, or to sign her name on the back of the documents as admitting the execution, or to do any other act towards their registration unless she were paid a sum of 100 rupees which she claimed from the petitioner. Under these circumstances, the Registrar of Madras refused registration of the earlier instrument, because Sections 66 and 67 of the Registration Act could not be complied with, and because the interlineation was not attested by the signature or initials of the executing party, and also because the description of the premises did not include the present and former occupancies. Registration of the second document was likewise refused, because Chinnammal would not sign any endorsement admitting execution, and because the description of the premises did not comply with Section 21.

Upon appeal to the Registrar General, he held that the decision of the Registrar was correct ; and in his reasons for refusing registration he draws attention specially to the diversity of practice which exists under Sections 66 and 67 of the Registration Act when the executing party refuses to sign the endorsement required by Section 66 although he admits the fact of execution. It seems to me that in such a case the registering officer cannot, without the order of the District Court under Section 84, proceed with the registration of the instrument. It is not unreasonable to suppose that the Legislature intended that in

cases of dispute between the party presenting an instrument for registration and the executing party, the matter should be referred to the District Court; and this view is supported by the language of Section 84, which requires the Registrar to obey the order of the Court and to follow the procedure prescribed in Sections 66, 67, and 68, "so far as may be practicable." The use of these words in this place shows that the Legislature had in contemplation cases in which a Court might order registration, and in which it might nevertheless be impossible to comply with the directions given in those Sections; and the absence of the same or any similar words in those Sections themselves, as well as the language of Section 68 which directs the registering officer to complete the registration "after the provisions of Sections 36, 66, and 67 shall have been complied with," lead me to the conclusion that the duty of the registering officer is to refuse registration unless those provisions can be complied with.

It is, however, to be observed that Section 66, or rather the part of it in question, has no application where the execution is not admitted; and there is one case in which a registering officer is by Section 36 required to register though the execution is not admitted, viz., where the executing party is dead, and the registering officer is satisfied of the fact of execution, though the representative of the deceased refuses to admit it. There is no inconsistency in these enactments, for when in Section 68 it is said that "after the provisions of Sections 36, 66, and 67 shall have been complied with," the registering officer shall endorse the certificate of registration on the instrument, the meaning of course is such of the provisions as may be applicable to the particular case, that is to say, if any person had admitted the execution, his signature must be endorsed, if any person has been examined his signature must be endorsed, if any payment has been made in the presence of the registering officer a statement of that fact must be endorsed; but of course if none of these things have occurred, the non-endorsement of them is not a failure to comply with Section 66.

1868. 9th June.

In the present case Chinnammal did admit the execution, and the registering officer could not properly, in my opinion, proceed with the registration when she refused to sign the endorsement. She has been examined before me, and her somewhat confused statement as to part of the consideration money being unpaid which is denied by the petitioner, is not, in my judgment, a sufficient ground for this Court refusing registration under Section 84. That dispute may be hereafter settled, if the parties require it, in a suit, in which these documents will, after they have been registered, be admissible in evidence.

It remains, however, for consideration, whether in other respects than those already mentioned, the requirements of the law for the time being in force have been complied with on the part of the petitioner; and the other objections to the registration of the instruments, are three: 1st, that the later of the two documents contains no description at all of the immovable property to which it relates ; 2nd, that the interlineation in the earlier of the two documents is not attested by the signature or initials of the executing party ; and 3rd, that the description of the premises in that document does not include the present and former occupancies. The first of these objections raises the question whether no instrument can be registered under this Act, in which the parcels are described by reference to another instrument. As a matter of conveyancing, there is no objection to that mode of description; and indeed it is by no means unusual in the case of the assignment of a lease or of the transfer of any other instrument to endorse the assignment or transfer on the lease or other instrument creating the right transferred and to describe the property simply by reference to the description in the original instrument. In a case which arose under the English Act regulating the registration of deeds in the county of Middlesex (See 19 L. J. Q. B. 537 15 Q. B. 976), the question was as to the proper form of the memorial where the deed to be registered was the assignment of a lease endorsed on the lease itself, and the Court said—" In the case of a second deed endorsed on a former deed, and importing by reference the description of the premises from the former

deed, it appears to us necessary that the particulars of the description according to the truth should be given, and that this would not be done unless the dates and parties to both deeds are specified, together with the description from both deeds. In such a case the deed to be registered expresses the lands by reference to another deed, and the memorial should state that the imported description is taken from the source referred to." This case is not of course referred to as an authority on the question now under consideration, for the language of the Indian Registration Act 1866 and the procedure under it is quite different from that of the Stat. 7 Anne C. 20; but as an illustration only of what the Judges considered necessary by way of description in such a case for the purpose of identifying the premises under Section 21 of the Indian Registration Act. That is the important point to be ascertained by the Court —is the description sufficient to identify the property? Now the mode of registration provided by the Act is that the instruments registered shall be copied in a book to be kept by the Registrar, and therefore no description by reference to a former instrument can be sufficient unless the former instrument be also registered; but it seems to me that where two instruments are contained on the same paper, and relate to the same property, and are both presented for, and in all other respects are entitled to, registration, it is not a sufficient ground for refusing registration that in the second document the property is described only by reference to the first. The books kept in the Registration Office would give the whole of both documents, and would show, or, I think, should show that they were written on the same paper, and the Index No. 2 would refer to both documents. Assuming the description in the first instrument to be sufficient for the purpose of identification, I am of opinion that under the circumstances abovementioned, the description by reference in the second is also sufficient for identification.

In the present case, then, is the description in the first document sufficient for identification, and does the second document contain a sufficient reference to the first? That the first document does contain a description sufficient for

1868. 9th June.

identification is, I think, clear. It sets out the four boundaries, and it gives the name of the street and of the village in which the house is situate, also the number of the house and the side of the street to which it points. Indeed it furnishes all the particulars mentioned in Section 21, excepting the existing and former occupancies, as to which I have held in a former case that the omission is not of itself a bar to registration.

I have felt more difficulty on the point whether in this case the second contains a sufficient reference to the first document. Neither document is at all of a formal or technical character; and there are no words in the second directly referring to the first for the description of the property, but it is impossible for any one to read the two documents together, as they were intended by the parties to be read, without seeing that the second does refer to the first, and operates only as a further charge on the same property. The certificate 346 is evidently the same referred to in the 1st document without number, and then the words "this also was mortgaged with you," and the words "received rupees 100, formerly due rupees 150, in all rupees 250," clearly connect the two documents together. Seeing then that this Registration Act is applicable generally throughout India, it cannot, I think, have been the intention of the Legislature that the right to registration should depend in any case upon the use of any formal or technical expressions in the instruments offered for registration, and it seems to me that whenever any question arises under this Act as to the nature or effect of any instrument, or the sufficiency of any description contained in it, the Court must endeavour to gather from the words used what the parties intended by them, and give effect to that intention just as if it had been expressed in the most formal and technical manner. I cannot but see that if in the exercise of the discretion given to the District Courts under Section 84, a practice should spring up of requiring, as a condition of registration, any degree of technical nicety of expression in the instrument offered for registration, a very beneficial measure may probably be rendered an instrument of great injustice; and in the present instance, though not without

1868. 9th June.

some hesitation, I have come to the conclusion that the description of the house in the first instrument must be taken to be incorporated by reference into the second, on the principle that *Verba relata in esse videntur.*

As to the two remaining objections, viz., the unattested interlineation, and the omission to state the occupancies, they are more easily disposed of. I have already held that the statement of occupancies is not a necessary condition of registration, if the description be otherwise sufficient to identify the property, as it seems to me to be in this case; and as regards the interlineation, the registering officer would not probably, in the exercise of his discretion under Section 20, have refused registration on that ground alone; for the interlineation in question does not materially affect the terms of the instrument, and the refusal by Chinnammal to attest it was not at all put upon the ground that it ought not to be there. Now although a discretion is given by Section 20 to the registering officer, the exercise of that discretion is manifestly subject to review by the District Court upon a petition under Section 84, and where there is no suggestion that there has been any improper alteration of the instrument after execution, and the only difficulty arises from the refusal of the executing party to attest an apparent interlineation, blank erasure, or alteration, I think that the Court ought not to refuse registration on that ground. The interlineation does not of itself render the document non-registrable; and though the executing party refuses to initial it, it seems to me that I cannot on that ground say that the requirements of the law have not been complied with *on the part of the petitioner* within the meaning of Section 84; and the requirements of the law having been complied with, I think that this is a proper case in which to order that the two documents be registered.

Appellate Jurisdiction (a)

Regular Appeal No. 15 *of* 1868.

MAYANDY TE'VAN and 8 others.........*Appellants.*

NA'RA'NAIYAN and 3 others...............*Respondents.*

The puttadárs of a ryotwári village have not such a common interest, as puttadárs, in all their holdings that they can jointly sue for the recovery of them.

If in any case such a right exist, it must be established by evidence.

1868. *June* 19. *R. A No.* 15 *of* 1868.

THIS was a Regular Appeal from the Decree of E. C. G. Thomas, the Civil Judge of Madura, in Original Suit No. 29 of 1866.

Scharlieb, for the Appellants, the plaintiffs.

The facts are sufficiently set forth in the following

JUDGMENT:—This is a suit originally brought by nine plaintiffs to recover from the defendants all the lands included in the village of Saidaputti excepting 1,000 gulies which the 1st defendant had recovered from the plaintiffs in a former suit. All the defendants in that suit were directed by the Civil Judge to be added as parties in this suit, and the number of plaintiffs was thus increased to sixty-six.

There is no objection of course to this joinder of plaintiffs, if they are suing on account of the infraction of any right common to them all, and if the common right which they allege is established by the evidence. That they do allege a common right is clear; for the plaint states that the Saidaputti village is Pandaravadi, and that the whole of the lands of the village belong exclusively to the plaintiffs and other sudras. It is, however, admitted that they have distinct and separate holdings under puttahs issued by the Collector in the same way as the ryots hold in an ordinary ryotwari village, and it is not easy to understand what is exactly the common right which they claim. We do not understand that it amounts to a claim of absolute joint ownership in all the village lands; for the second ground of appeal states that the suit

(a) Present: Bittleston and Ellis, J. J.

is based on a wrongful dispossession by the defendants, and not on any peculiarity of the plaintiffs' title or of village tenure; but rather, as we gathered from Mr. Scharlieb during his argument on behalf of the appellants, to a claim of a joint and exclusive right of occupancy directly under the Government; and the claim appears to be made specially on behalf of all sudra inhabitants of the village to the exclusion of brahmins. Indeed the right claimed would probably be most accurately described as a common right of the sudras to exclude the brahmins.

But whether the claim be one of joint occupancy or joint ownership, or a joint right to keep out the brahmins, it appears to us that the Civil Judge was right in saying that the evidence adduced was insufficient to establish any such common right. Three witnesses belonging to other villages make a statement to the effect that the village is held in common; but the only facts to which they distinctly depose tend the other way. Each ryot holds his land under a separate puttah, pays the tirva for the land so held, cultivates it himself and enjoys the produce; nor is there any evidence of an arrangement or custom amongst the ryots for any periodical distribution of the lands as was the case in Special Appeals 401 and 409 of 1863, (2, M. H. C. Reports, p. 1.)

The 3rd witness says: "The puttah for a land is issued in the name of the cultivator; it does not belong solely to the cultivator; it is common; if one allows a land to lie waste, another will cultivate in the next year; I don't re-collect specifically whose land was cultivated by another. In the said village aliens cultivate the land with the permission of the ryots of the village. I don't know which particular ryot permitted which particular alien to cultivate." This is a fair specimen of the evidence adduced by the plaintiff, and if on no other account is by its very vagueness disentitled to much consideration. "If one allows land to lie waste another will cultivate it next year." But what other and upon what terms and under what arrangement with the other villagers? In numerous cases it has been held that lands held on the terms of an ordinary

1868. June 19. R. A. No. 15 of 1868.

ryotwari settlement with annual puttahs and left waste by the puttahdar may be legally granted to other ryots by the Revenue authorities (See 1, M. H. C. Reports, pp. 12 and 407), and if the statement of the witness means no more than this, then this village of Saidaputti is not different from any other ordinary ryotwari village; and we are not aware that it has ever been held that the puttahdars of a ryotwari village have such a common interest in all their holdings that they can jointly sue for the recovery of them. In some villages, no doubt, there is a community of interest as was found to be the case with regard to the agraharam village of Neykáraputti, in the Salem Zillah, (3, M. H. C. Reports 59,) and to such instances probably Mr. Montstuart Elphinstone was referring in the passage cited from *Maine's Ancient Law* 263-4 in p. 3 of M. H. C. Reports, volume 2, note (a). So there may be on certain questions a sufficient community of interest to entitle the ryots of a village to sue jointly as was held in a suit brought for the ascertainment of the boundary between two villages; (3, M. H. C. Reports 226,) but in the present case there is no question as to what lands are within the village; the only question is whether the plaintiffs have been wrongfully dispossessed of their holdings by the defendants, and if the holdings under each puttah are distinct, it would manifestly be very inconvenient to try in one suit the rights of the several plaintiffs to perhaps 40 or 50 different holdings, which are described in the plaint, as lying in pieces in different places.

The documentary evidence adduced on behalf of the plaintiffs is not entitled to any greater weight. At the most it shows that in early times the ryots of this village were all sudras; and that generally the large majority have been so, but brahmins also appear sometimes in the village accounts. In the Collector's letter, dated — June 1842, it is stated that the brahmins had not resided in the village for a length of time and had never cultivated lands in it, nor had they paid the Government tax; but that for the ten years, from 1832 to 1842, the puttahs had been issued in the names of the ryots as cultivators on behalf of the brahmins, a practice commenced originally with the con-

sent of the ryots, and not objected to until the brahmins began to demand rent. Upon this statement the Board of Revenue decided that the puttahs should be issued in the names of the cultivating ryots, leaving the brahmins to establish their right to the land in the Civil Courts. And to some extent at least that has been done, for it is admitted that the right of the 1st defendant to 1,000 gulies of land in this village, or nearly one-third of the whole, has been conclusively established as against the present plaintiffs in Suit No. 19 of 1859, and that decree, though not conclusive, except as to the land to which it directly relates, would, upon the question of common right set up by the plaintiffs on behalf of all the villagers, be admissible and cogent evidence to negative the right, for the right, if it exists at all, exists as to all the lands of the village. In the present case, however, we have come to the conclusion that the evidence is insufficient to establish the existence of the right, and we think that no such right can be recognised unless established by evidence.

The reference in Mr. Maine's Ancient Law to Indian village communities as an assemblage of co-proprietors (p. 260) is certainly not intended by the learned author as a statement that in all or in the majority of Indian villages in the present day there subsists amongst the holders of land the legal relation of joint-owners. Indeed in another passage (p. 267) he says " the co-owners of an Indian village, though their property is blended, have their rights distinct, and this separation of rights is complete and continues indefinitely."

The severance of rights he assumes to be complete and permanent in the case of an Indian village, and mentions it as a distinction of Russian villages that " after the expiration of a given but not in all cases the same period separate ownerships are extinguished, the land of the village is thrown into a mass, and then it is re-distributed among the families composing the community according to their number," but this very custom was found to exist in an Indian village in the case already alluded to. (2, M. H. C. Report, p. 1.) These matters, however, are only

1868. June 19. R. A. No. 15 of 1868.

referred to by Mr. Maine in illustration of his argument, or "conjecture" as he terms it "that private property, in the shape in which we know it, was chiefly formed by the gradual disentanglement of the separate rights of individuals from the blended rights of a community," and there is certainly nothing in the language used which would warrant us in presuming that in any particular village the present holders of land under separate puttahs are joint owners or have any such common interest in the land that the dispossession of any one gives a cause of action to all. We must therefore confirm the decision of the Civil Judge, but, as the defendants did not appear, without costs.

Appeal dismissed.

Appellate Jurisdiction (a)

Regular Appeal No. 21 *of* 1868.

SYED AMIN SAHIB............ *Appellant.*

IBRAM SAHIB and 5 others............ *Respondents.*

A suit by an Officer of a mosque, temple, or religious establishment for dismissal from his office is not a suit for misfeasance within the meaning of Section 14, Act XX of 1863.

1868. July 15. R. A. No 21 of 1868.

THIS was a Regular Appeal against the decision of O. B. Irvine, the Acting Civil Judge of Chittoor, in Original Suit No. 37 of 1866.

G. E. Branson and *Waddell,* for the Appellant, the plaintiff.

Rama Row, for the 1st, 2nd, and 3rd Respondents, the defendants.

The facts sufficiently appear from the following

JUDGMENT:—This is a suit to obtain restoration to the office of khatil of a mosque from which the plaintiff had been, as he alleged, wrongfully dismissed by the defendants who are the committee having the superintendence of the mosque under Act XX of 1863, and to recover damages for such dismissal.

(a) Present: Scotland, C. J., and Ellis, J.

1868. Juyl 15. R. A. No. 21 of 1868.

In point of amount the suit was cognizable by a Court inferior in grade to the Civil Court, but, being considered a suit to which Section 14 of Act XX of 1863 applied, it was instituted in the Civil Court with the leave of the Court, as required by Section 18, and in due course issues were settled and the case brought on for final hearing. At the first hearing it was objected on the part of the defendants that the Act did not apply to the suit, and therefore the Court could not take cognizance of it, and the objection was overruled. But at the final hearing the objection was renewed, and on the authority of the case of *Agri Sharma Embrandi* v. *Vistnu Embrandi* 3, *Madras High Court Reports*, 198, the Civil Judge decided that Act XX of 1863 did not apply, and the Court therefore had no jurisdiction to hear the suit, and thereupon a decree was passed dismissing the suit from which the plaintiff has appealed.

The general question raised for determination is whether a suit by an Officer of a mosque, temple, or religious establishment for dismissal from his office is a suit for misfeasance within the meaning of Section 14 of Act XX of 1883, and we are of opinion that it is not. The enactments in Sections 14 and 15 are enabling and intended to give to the persons described and who are individually not interested otherwise than in connection with others, the right to sue individually before the Civil Court "the member of any committee appointed under this Act for any misfeasance, breach of trust, or neglect of duty committed by such member of such committee in respect of the trusts vested in or confided to them respectively, and that it is to suits of that nature only that the leave of the Court is necessary under Section 18. We think misfeasance in this provision was simply used with reference to wilful acts of breach of trust, acts of a criminal nature; and that the provision applies to personal misconduct amounting to a breach of trust or neglect of duty by any member of the committee in respect of the property and endowments vested in the committee by Section 12, and of which they are by Section 13 required to keep regular accounts. It has no reference, we think, to acts done by the body of the committee in exercise of the authority which they possess to remove the

1868. July 15. R. A. No. 21 of 1868.

officers and servants of a religious establishment, and appoint others in their stead. There may be a removal from an office on insufficient grounds, without any misfeasance, on the part of the committee, and an improper removal occasions an injury and loss in respect of which redress can be obtained only by the person dismissed, and to a suit for such redress, it is clear to us that Section 14 has no application—its sole purpose and effect, we think, is to enable persons to sue for the protection of the property, and the proper application and administration of the funds and affairs of the establishment in which they have a common interest.

This construction of Sections 14 and 15 of the Act is in accordance with the view taken not only in the case acted upon by the Civil Judge, but also in the case of *Chinna Ray Aiyangar* v. *Subbraya Mudally*—3, *Madras High Court Reports* 334.

In the course of the argument we were referred to Regular Appeal No. 85 of 1867, decided by this Court on the 17th February last, in which it was said the Court had on a similar question expressed an opinion contrary to that now entertained. We have referred to the judgment, and find that it was given on two totally different points, and the Chief Justice finds no mention in his notes of the argument of the point of jurisdiction having been urged. Besides the Civil Court had fully heard and decided that case on the merits.

For these reasons we are of opinion that the present suit was cognizable by a Court of inferior grade to the Civil Court, and that the Civil Court might on that ground refuse to hear and decide it. The decree therefore must be affirmed, but we think there should be no costs allowed.

Appeal dismissed.

Appellate Jurisdiction (a)

Regular Appeal No. 110 *of* 1867.

SAHIBA BEGUM.......................*Appellant.*

G. ATCHAMMA and six others.............*Respondents.*

In a suit upon a hibbanama alleged to have been executed by the husband of the plaintiff giving her twenty-two shares in a village as a gift in lieu of her dower, the Civil Judge dismissed the suit upon the ground that the omission of the amount of the dower rendered the instrument of no validity according to Muhammadan Law.

Held (reversing the decree of the Civil Judge) that the suit was maintainable, the instrument expressing plainly the specific shares of the property, and that the gift was made in lieu of the whole dower, and there being no room for doubt as to the meaning and intention of the contracting parties in regard to the particular subjects either of the gift or of the consideration.

1868. *August* 8. *R. A. No.* 110 *of* 1868.

THIS was a Regular Appeal from the decision of J. R. Cockerell, the Civil Judge of Nellore, in Original Suit No. 29 of 1867.

Rama Rau, for the Appellant, the plaintiff.

Rangaiya Nayudu, for the Respondents, the defendants.

The facts appear in the following

JUDGMENT :—This is an appeal from the decree of the Civil Court of Nellore dismissing the suit. The plaintiff is the widow of Vahadallisha Saib, and claiming under a hibbanama alleged to have been executed by her husband on the 1st April 1858, she seeks to recover twenty-two shares of the shrotriem village of Kasmur, in the Gudur taluq, and the value of certain produce. The defendants 1 to 5 alone defended the suit. In their written statement they aver that the alleged hibbanama is a forgery, and set up that the plaintiff's husband, who held only twenty shares of the village, on the 25th June 1858, executed a kaval or lease to the first defendant for nineteen years under which all the said defendants had held possession. They also object that the hibbanama, if genuine, is invalid by Muhammadan Law, as it does not specify the boundaries of the lands, nor the amount of the dowry for which the land was given. The Civil Judge, without recording any issue or hearing evidence, has decided against the plaintiff's right to maintain the suit on the ground that the omission to state the amount of the dower in the hibbanama rendered

(a) Present: Scotland, C. J., and Collett, J.

1868. August 8. R. A. No. 110 of 1868.

it of no legal validity, and the sole question raised in the appeal is whether this is a sound view of the Muhammadan Law, assuming the written instrument to have been executed *bonâ fide* and a dower debt as therein stated to be due. The material part of the instrument is as follows : " I do hereby declare and give in writing to this effect that out of the ninty-six shares of the shrotriem village of Kusmare, in the taluq of Survapully at Nellore, six shares are my mother's, and sixteen shares are mine. These twenty-two shares consisting of wet and dry land and houses thatched with straw are in my own exclusive possession and enjoyment. I do hereby grant the said inam land as a gift to my wife Sahiba Begum in lieu of her dower. This gift is to be considered valid, lawful, and conclusive, and neither I, nor my heirs, nor my representatives shall have any right, interest, or title in it." Contracts of this nature are of the class of hibbanamas designated by the Mahomedan Law Hibeb-bil-Iwaz or gift for an exchange, but it seems that when the iwaz or exchange (in this case the dower) is merely stipulated for in the contract as the consideration for the hibeb or gift (as it is here) the transaction is not in the eye of the law strictly a Hibeb-bil-Iwaz, but is treated as a contract of sale, and does not require for its validity the essentials of an ordinary Hibbanama or even of a Hibeb-bil-Iwaz. *Mac. Prin. and Prec.* 52, 199, 217, 219, 276 ; 3 *Hedaya* 291, 293, *and* see the case of *Sarah Begum* v. *Ghulam Mahomed Khan* 1, *Decis. N. W. P.* 199. A true contract of the latter description takes place, it appears, when the iwaz rests not merely on a stipulation in the contract, but is effected by a reciprocal act distinct from the Hibeb.—*Baillie's Dig. of Mahomedan Law, page* 122, and the authorities there referred to.

In the present case, then, the written instrument is to be regarded as legally of the nature of a contract of sale the debt due for dower being the stipulated consideration for the gift of the land, and the point for consideration is whether such a contract is invalidated for uncertainty by the omission to specify the amount or value of the thing which is the consideration, or the boundaries of the pro-

perty disposed of. The general rule as to definiteness and certainty is thus propounded by Mr. Macnaghten, " it is essential to the validity of every contract of sale that the subject of it and the consideration should be so determinate as to admit of no future contention regarding the meaning of the contracting parties" *Princ. and Prec. M. L. Chapter* 3, *Sec,* 13, and Mr. Baillie's statement of the rule in his work on the *Mahomedan Law of Sale, p.* 4, is to the same effect, but he adds an illustration which aids in determining its true import. It is required, he says, " that both the thing sold and the price be so known and determined as to prevent disputes between the parties, and any ignorance that may tend to produce contention between them is sufficient to invalidate the sale, as in the sale of a single goat undefined from a particular flock or of anything at a price to be fixed by another person."

The whole effect of the rule thus expounded we understand to be that the property disposed of and the consideration for which the disposition is made should be specifically known to the parties, and so determined by their agreement as to admit of their intention being ascertained from the terms of the contract, and that if the terms are sufficient for this purpose, it is no valid objection that they are not as completely certain and definite as the subjects of the contract admitted of their being. All, it appears to us, that the rule reasonably construed provides against is the uncertainty of either of the parties when the contract is made in regard to the particular thing contracted to be given or received. It would be against reason to carry it to the length of in validating a contract which clearly expressed a definite understanding as to the subject of it, because in giving effect to the distinct intention something supplementary was left to be ascertained dehors the term of the contract which might give rise to dispute.

This view of the law has been acted upon by the Sadr Dewany Udalut of Bengal.—*See* 1 *Morley's Dig.* 268, and particularly the cases of *Imdad Ali* v. *Kadar Baksh,* 5, *Sud. Dew. Ada. Rep.* 298, *Musnud Ali* v. *Koorsheed Banoo* 1 *Sud. Dew. Ad. Rep.* 52 *and Ghulam Husainali Vzeinal Beebee*

1868. August 8. R. A No. 110 of 1868.

Ib. 51. The only authority that we have been able to find bearing against this view are the opinions quoted in argument from *Mac. Princ. and Prec.* 174, 177, and relied on by the Civil Judge, which do no doubt represent that a statement of the amount of the dower debt and a description of the property given by metes and bounds are absolute requirements of the law. Of the weight to be given to these opinions there is nothing said, (In a note at page 124 of Mr. Baillie's Digest of Mahomedan Law they are spoken of as the opinions of officers of inferior Courts) and no authority is referred to in support of them. But there is the note of Mr. Macnaghten to one of the opinions in which he gives the great weight of his sanction to the statement that specification in all contracts of exchange is indispensable, but expressly for the reason stated in the passage before quoted from his work, namely, to preclude all contention as to the meaning of the contracting parties. We do not understand that the learned author would have considered a contract of this nature invalid because of the omissions now made a ground of objection, if it evidenced clearly the intention of the parties as to the extent of the property transferred and the consideration for the transfer. Actual delivery of possession not being an essential, there is, we think, no sound reason for requiring in this kind of contract any more than in an ordinary contract of sale more than a sufficient definiteness and certainty to make known what had been specifically determined upon and agreed to by each of the parties, and we see no sufficient authority for saying that there is any positive law going beyond that requirement.

Then is the present contract sufficiently certain on its face to satisfy the law? We are of opinion that it is. It expresses in plain language the specific shares of the property, and that the gift was made in lieu of the *whole* dower. There is no room for doubt as to the meaning and intention of the contracting parties in regard to the particular subjects either of the gift or of the consideration. For these reasons, we reverse the decree of the Lower Court and remand the case, in order that proper issues may be recorded, and the case heard and determined on the merits.

Appellate Jurisdiction (a)

Regular Appeal No. 46 *of* 1868.

PALANIAPPA CHETTI.................. ......*Appellant.*

RAYAPPA CHETTI......... ....*Respondent.*

A suit lies to enforce an award made without the intervention of a Court of Justice.

The procedure provided in Section 327 of the Civil Procedure Code is not imperative upon a plaintiff who seeks to enforce an award so made.

THIS was a Regular Appeal against the decision of H. D. Cook, the Civil Judge of Coimbatore, in Original Suit No. 28 of 1865. 1868. *August* 12. *R. A. No.* 46 *of* 1868.

The plaint stated that a settlement of disputes existing between plaintiff and defendant was made by arbitrators on the 18th January 1864, by which the defendant was bound to pay to the plaintiff the sum of rupees 1,245-8-6, for which amount, together with interest, the suit was brought.

In the defendant's written statement it was alleged that as the suit was based on the decision of arbitrators, the suit could not be maintained under Section 327 of the Civil Procedure Code.

The Civil Judge dismissed the suit on the ground that there was no cause of action, as Section 327 did not permit a party affected by an award to re-open the case in a Court of Justice and to have a decision on the merits. As regarded the merits, the case had been determined by the arbitrators, and was conclusive between the parties.

The plaintiff appealed.

Srinivasa Chariyar for *Rama Rau* for the Appellant, the plaintiff.

Venkatapathi Row, for the Respondent, the defendant.

The Court delivered the following

JUDGMENT:—This is a suit brought to recover in accordance with an award. The Civil Judge decided the case and dismissed the suit upon the preliminary objection

(a) Present: Scotland, C. J., and Collett, J.

1868. August 12. R. A. No. 46 of 1868.

that a suit will not lie upon an award, but that the only course open to the parties to enforce it is by a proceeding under Section 327 of the Civil Procedure Code. This decision is clearly erroneous. Under Section 327 it was certainly open to the plaintiff to adopt the procedure therein provided, but the Section is not imperative, and there is no doubt that a suit lies to enforce an award made without the intervention of a Court of Justice. The remark made by the Civil Judge as to the opening up of the merits leads us to make the observation that, if the award has been duly made, it is binding upon the parties as regards the matters thereby decided. We, therefore, under Section 351, Civil Procedure Code, reverse the decree of the Civil Court and remand the suit to be heard and determined upon the merits. The costs of this appeal should be borne by the defendant.

Original Appellate Jurisdiction (a)

Regular Appeal No. 5 of 1868.

T. KISTNASAMY PILLAY..........................*Appellant.*

THE MUNICIPAL COMMISSIONERS FOR THE TOWN OF MADRAS.................. *Respondents.*

Contract—Set off—Stamp.

The right of set off exists where thereare cross demands arising out of one and the same transaction or where they are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross suit. In a suit to recover money due under a contract made between the plaintiff and defendants,

Held, that the defendants were entitled to set off the amount of damages which the defendants had proved they had sustained by reason of the plaintiff's breach of the contract sued on.

Where a written contract liable to an optional stamp is put in evidence by the defendants, the plaintiff cannot recover a larger amount under it than (if stated) the optional stamp upon the instrument would have been sufficient to cover. In a suit for the recovery of money due under a written contract, the defendants admitted that a sum of rupees 6,328-4-0 was due to the plaintiffs, subject to certain deductions which they claimed to be entitled to set off against the plaintiff's claim. The defendants put in evidence the written contract, the stamp upon which was only sufficient to cover the sum of rupees 5,000.,

Held, that notwithstanding the admission of the defendants, the plaintiff could only recover rupees 5,000 in the suit.

1868. August 12. R. A. No. 5 of 1868.

THIS was an appeal from the decree of Bittleston, J. in Original Suit No. 440 of 1867 dismissing the suit,

(a) Present: Scotland, C. J., and Collett, J.

The suit was brought by the plaintiff to recover rupees 6,328-4-0, being the balance which he alleged to be due to him by the defendants under a contract for the supply of bullocks and drivers for the scavengering department, and rupees 11,812, being damages for breach of the said contract.

The defendants denied the breach of contract, but alleged that the plaintiff had committed several breaches of the contract, and that they were entitled to recover upwards of rupees 10,000, for fines which they had lawfully imposed upon the plaintiff, and for damages which they had incurred upon a new contract which they were obliged to enter into by reason of the failures and defaults of the plaintiff.

Amongst the issues settled were the following:—

1. Whether the defendants were entitled to recover from the plaintiff the sum of rupees 5,280, for the hire of bullocks from other persons, such hire having been occasioned by the breach of the plaintiff's obligations under the contract?

2. Whether the plaintiff is entitled to the sum of rupees 11,812, or any part thereof from the defendants, for damages by reason of the defendants' breach of the contract?

Issues were also given as to the right of the defendants to deduct certain fines from the amount payable to the plaintiff.

The following extract from the judgment of Bittleston, J, sets forth the facts, so far as it is necessary to state them:—

In June 1865, the plaintiff in this case entered into a contract with the Municipal Commissioners of Madras for the supply of bullocks for the use of the scavengering department from 1st July 1865 to 30th June 1868.

By the terms of that agreement, the plaintiff bound himself to supply 460 good strong and serviceable bullocks, "less or more as might from time to time be deemed necessary by the Commissioners," with one driver to each pair of bullocks, on being paid the monthly sum or hire of

1868. August 12. R. A. No. 5 of 1868.

rupees 15, (meaning as both parties admit, rupees 15, for each pair of bullocks supplied). He undertook to keep and have at all times ready the abovementioned number of bullocks and drivers, or less or more as might from time to time be required for the use of the scavengering department, in such proportions and at such places and for such work within the town and suburbs of Madras, as might be ordered by the Municipal Commissioners, at four in the morning of each day; that the work should commence at half-past four in the morning and continue to half-past ten in the forenoon, commencing again at two in the afternoon and continuing to six in the evening; and that for each driver absent or late in the morning or afternoon a fine of annas eight should be inflicted; and for each bullock deficient or absent, annas twelve each day. The bullocks and drivers were to be under the immediate orders of the Municipal officers, and to collect the rubbish in the usual manner under the penalty of twenty rupees for each offence. Further, the plaintiff agreed that if upon examination of the bullocks from time to time by the Municipal Commissioners, or persons appointed by them for the purpose, any should be found otherwise than good and serviceable and fit for the required draught, the same should be rejected, and others should be immediately supplied by him; and that on his failure to do so, the Municipal Commissioners might purchase others in lieu of those rejected, and recover from him in manner thereinafter directed the amount so lid out, or they might put an end to the contract. The words are: "Failing whereof it shall not only be lawful for the Municipal Commissioners for the time being, and they are hereby fully empowered, to purchase others in lieu of those rejected, and to recover the amount so laid out in manner hereinafter directed, but such neglect and inattention shall clearly subject me the said contractor, T. Kistnaswamy Pillay, to the forfeiture of my contract, should the Municipal Commissioners for the time being consider it expedient to resort to that ulterior measure."

The agreement then provides for the monthly payment on the 10th day of each month, to the contractor of the hire agreed upon according to the number of bullocks

employed during the preceding month "after making the deductions thereinafter authorised." It provides for the contractor giving security by the deposit of Government Promissory Notes to the extent of rupees 4,000; and then follows the alarming but really harmless and inoperative clause (to which the plaintiff probably alludes in one of his letters when he speaks of being "bound hand and foot"), whereby it is declared that it shall rest exclusively with the Commissioners to determine what constitutes a breach of the foregoing conditions, and that the plaintiff shall bring no action or suit for anything done or omitted under the agreement. As I see that there is a similar clause in the new contract into which the Municipal Commissioners have entered, I may be excused for saying, in passing, that it seems to me not a commendable practice to introduce clauses of this kind into agreements, especially with natives, for though the law deprives them of any legal validity, the ignorance of the contractor may give them an illegitimate operation, by inducing him to abandon a part of his just rights under the contract. The last clause of the agreement now in question is, however, more important; for by it the plaintiff expressly authorises the Municipal Commissioners "to deduct the amount of such penalties as may be forfeited under the several before written conditions, either from the monthly hire of bullocks and drivers, or to hold the before-mentioned Government Promissory Notes as security for the same, or to do both as they may consider necessary and most expedient." Under this agreement, the plaintiff supplied bullocks and drivers in the three Municipal districts down to the end of May 1867, when he ceased to supply any in the 2nd district, excepting four pairs of bullocks and four drivers for the Slaughter House Depôts, of which three were continued down to the 12th June only, and one pair to the end of July. In the 3rd district he continued his supply to the end of July, and he is to the present time supplying the Municipal Commissioners with bullocks and drivers in the 1st district.

The present suit is brought by him to recover, first, the sum of rupees 6,328-4-0, in respect of the bullocks and drivers

1868. August 12. R. A. No. 5 of 1868.

actually supplied in the 1st, 2nd, and 3rd districts during the months of April, May, June, and July 1867; and, secondly, the sum of rupees 11,812 as damages for an alleged breach of contract by the Commissioners in refusing to receive his bullocks and entering into a new contract with another person for the supply of bullocks and drivers in the 2nd and 3rd districts. The amount of plaintiff's claim for bullocks and drivers actually supplied is not disputed, except as to rupees 18, the amount claimed for three pairs of bullocks during the first twelve days of June; but the answer of the Municipal Commissioners is, that the amount is more than covered by the deductions which they are authorised to make under the contract or by damages for the plaintiff's breaches of contract which they are entitled to set off; and the plaintiff's claim to damages is wholly denied by the defendants.

It will, I think, be convenient to consider in the first place, whether the plaintiff's claim for damages can be sustained under the circumstances of this case, because the determination of that question necessarily involves a consideration of the different complaints made against each other by the two parties to this contract. [His Lordship then proceeded to state the evidence on this point and continued.]

The question is whether the Municipal Commissioners were justified in taking the steps which they did in the month of June to procure a new contract for the 2nd and 3rd districts and so to put an end to the plaintiff's contract. In my opinion they were so justified. The cleansing of the streets is an important part of the public duty entrusted to the Commissioners, and interruptions in the performance of that duty may be attended with serious consequences to the public health. In a contract, therefore, for the carrying out of the work of the scavengering department they were bound to provide, as far as possible, against such interruptions; and it was of the very essence of this contract with the plaintiff, that he should be ready with his bullocks at the places appointed by them. An accidental failure in this respect on rare occasions would not justify the Commissioners in putting an end to the contract, though it might subject the contractor to fines

but it seems to me that a deliberate refusal (as this in my opinion was) to supply any of the bullocks required for a particular district, at the place pointed out by the Commissioners, on the alleged ground of the inconvenience of that place to the contractor, persisted in until the Commissioners had made fresh arrangements for obtaining the supply from another contractor, was such a complete violation of the contract, as to warrant the Commissioners in putting an end to it,—or rather treating it as so far abandoned by the plaintiff himself. The question is, in cases of this kind, whether there has been so complete failure on the one side to perform the contract, as to warrant the other party in considering it practically abandoned. (*Franklin* v. *Miller*, 4 Adol. and Ell. 599; *Withers* v. *Reynolds*, 2, B and Adol. 882.) This is independent of any express stipulations in the contract; but in this case the 5th clause of the contract expressly authorises the Commissioners to forfeit the contract in case of neglect to supply good and serviceable bullocks in lieu of those rejected, should they consider it expedient to resort to that ulterior measure. And although the Commissioners did not immediately exercise that power upon the neglect to supply others in lieu of those rejected on the 3rd April, the neglect was a continuing one, and when, in addition to that neglect, there was added, in June, the refusal to remove the bullocks to the Choolay depôt, they were entitled, as it seems to me, to take all the then existing circumstances into consideration for the purpose of determining whether it was expedient to resort to that ulterior measure of forfeiting the contract.

Under all the circumstances of this case, therefore, it appears to me that the defendants were, by the plaintiff's breaches of contract in the early part of the month of June, released from any obligation to continue the employment of his bullocks in the scavengering department, and that his claim for damages consequently fails.

It now therefore becomes necessary to consider whether any of the deductions claimed by the defendants from the sums admitted to be due to the plaintiff for bullocks actually supplied can be allowed.

1868. August 12. R. A. No. 5 of 1868.

[His Lordship found that the defendants were entitled to claim rupees 5,678 in respect of the fines which they were empowered to impose under the contract, and rupees 5,192 as damages by reason of the increased cost which they had incurred in procuring bullocks under the new contract during the unexpired period of the plaintiff's contract.]

[The judgment proceeded.]

Now can the damages which have been above ascertained be set off in this suit? It appears to me that they can, and I come to that conclusion mainly in consequence of the nature of the agreement between these parties indicating very clearly, as it seems to me, an intention that any claim of the defendants for breach of the agreement by the plaintiff should be deducted from the sums becoming due to the plaintiff under it, so that only the balance should be the debt on either side. The words in the last clause of the contract authorising the deduction of "such penalties as may be forfeited under the provisions, contained in the 2nd, 3rd, 4th, 5th, and 6th conditions before written," would not, perhaps, according to their ordinary meaning, apply to unliquidated damages for the breach of the contract, but it is clear that they were intended to apply to some claims of that nature, for the 5th clause provides for the recovery in that manner of any amount laid out in purchasing other bullocks in lieu of those rejected, which amount would be in the nature of unliquidated damages to be ascertained by the Court upon an inquiry as to what had been necessarily and properly expended, and further the deposit of Government notes is made generally to secure the due fulfilment of the agreement, and the Commissioners are expressly authorised either to deduct the forfeiture from the monthly hire, or to hold the notes as security, or to do both. Such being the nature of the agreement between the parties, this case falls within the rules laid down in *Clarke* v. *Ruthnavaloo Chetty*, 2, M. H. C. R. 296, in which the Court, after reviewing the cases, says, "It seems to us that the right of set off will be found to exist, not only in cases of mutual debts and credits, but also where the cross demands arise

out of one and the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross suit." I would refer also to the remark of Mr. Justice Wills in a recent case of *Watson* v. *The Mid-Wales Railway Company*, 36, L. J. C. P. 285 who, after referring to the dictum of Lord Cottenham in *Rawson* v. *Samuel*, that "the mere existence of cross demands is not sufficient," says : "It is necessary to shew mutual credit; I do not mean in the sense of mutual credit under the statutory provisions of the Bankrupt Law, but in the sense of there being an agreement or contract made, or to be inferred, that one debt was to liquidate the other. Where the balance only is to be the debt, there is a clear equity that one of the parties is not to have any detriment by the act of the other." In that case there was nothing from which the Court could infer that one liability was to liquidate the other, or that the balance only was to be considered due and therefore the set off was not allowed. In *Jeff* v. *Wood*, 2, Peere Williams's Reports 129, the Master of the Rolls says, "It is true, stoppage is not law, nor is it of itself a payment in equity, but then a very slender agreement for discontinuing or allowing the one debt out of the other will make it a payment, because this prevents circuity of action and multiplicity of suits which is not favored in law, much less in equity. But it may be a doubt, whether an insolvent person may in equity recover against his debtor to whom he at the same time owes a greater sum, though I own it is against conscience, that A should be demanding a debt against B to whom he is indebted in a larger sum and would avoid paying it. However, it seems that the least evidence of an agreement for a stoppage will do, and in these cases, equity will take hold of a very slight thing to do both parties right, and it is still more reasonable that when the matter of the mutual demand is concerning the same thing there the Court should interpose and make the balance only payable." The demands in that case were on the one side for a legacy by the assignees of the legatee who had become bankrupt—and on the other, by the executor for money due to the testator's estate on account of the clothes, education, and

1868.
August 12.
R. A. No. 5
of 1868.

1868. August 12. R. A. No. 5 of 1868.

board supplied by the testator to the legatee when an infant; and the Master of the Rolls decreed an account and declared that the executor was to pay only the surplus after deducting what was due from the legatee, as well to the executor as to the testator. In *Young* v. *The Bank of Bengal*, 1, Moore's Ind. App. 87, it was no doubt held that, the mere deposit of Company's paper or other security does not of itself constitute a giving of credit within the Bankrupt and Insolvent Acts, and that a debt contracted before and unconnected with the deposit could not be set off against the claim of the depositor's assignees to recover the balances of the securities after paying the debts in respect of which they had been deposited. But the securities in the present case were deposited expressly to secure the due performance of the agreement, and the proceeds would undoubtedly be applicable to the payment of damages sustained by the Commissioners by the plaintiff's breach of contract. And, further, the Commissioners are expressly authorised with respect to many breaches of contract, to treat the monthly hire as a fund in hand for the same purpose, and to resort either to one or the other as they pleased. Can it be doubted that the intention of these parties was, that in case of cross claims arising under the agreement the balance should be paid by either the one or the other? It seems to me that there is here something more than "a very slight thing" for equity to take hold of in order to do both parties right in one and the same suit. The present case differs widely from *Rawson* v. *Samuel*, Cr. and Ph. 178 where (as the Lord Chancellor observed) "there were not even cross demands, as it could not be assumed that the balance of the account would be found to be in favor of the defendants at law," and the remarks of the Lord Chancellor on the injustice of preventing a party who had recovered damages at law from receiving them because he might be found to be indebted upon the balance of an unsettled account to the party against whom the damages had been recovered are quite inapplicable. For here, in one and the same suit, the cross claims are alleged and proved, and the amount of each ascertained; they arise out of the very same contract, and though the defendants' claim be for unliquidated damages, that is, for an amount which can only

be ascertained by the decision of a Court, yet that circumstance does not necessarily exclude the right of set off at equity, though it does at law, of which *Beasley* v. *D'Arcy* and *Piggott* v. *Williams* cited in *Rawson* v. *Samuel*, are instances.

1868. *August* 12. *R. A. No.* 5 *of* 1868.

I have hitherto considered this case as if no question had arisen under the Stamp Act X of 1862, because I thought it desirable to keep the different questions raised in the course of the case as distinct as I could, so that, in the event of an appeal from my decision, the Appellate Court may the more easily dispose of it.

The question under the Stamp Act arises thus. The written contract No. 8, on which the plaintiff is suing, was tendered in evidence by the plaintiff's counsel, but upon an objection being made to the insufficiency of the stamp, it was withdrawn and the case closed without it. The plaintiff therefore upon his own case must have failed, excepting as to any sums of which he could show a clear admission by the defendants; and upon admissions of the defendants he could show a sum of rupees 6,328-4-0 due to him. But afterwards the contract was again tendered in evidence by the defendants' counsel as part of their case; and then its reception was objected to by the plaintiff's counsel on the ground that it was insufficiently stamped with a 25 rupee stamp. After hearing the matter argued, I held that the instrument was an obligation for the payment of money, but that the amount of the money to be secured was not specified, and that consequently an optional stamp was proper under the 17th clause of Schedule A of the Act. The contract was accordingly admitted and read in evidence. The consequence of this ruling is, that Section 27 of the Act applies to this case. That Section provides "that no larger sum shall be recoverable in any Court of Justice by reason of any deed, instrument, or writting, for which an optional stamp is indicated to be proper by Schedule A annexed to this Act than the largest sum for which, if specially stated in a deed, instrument or writing of the same denomination, the stamp actually used under the option so given would be of suf-

1868. August 12. R. A. No. 5 of 1868.

ficient value. And no such deed, instrument or writing shall be held by any Court of Justice to be valid in respect to any sum of money larger than that for which the stamp on the said deed, instrument or writing would be sufficient." Now the 25 rupees stamp is not sufficient for any larger sum than rupees 5,000; and the question is, how is this provision to be acted upon under the circumstances of this case? I am not aware that there has been any decision upon it, but it seems to me that full effect can only be given to the words of the Legislature by holding that the agreement is altogether invalid as to any sum beyond that for which the stamp affixed is sufficient. It was argued by Mr. Mayne that the provision did not touch his client's case because he did not rely upon the instrument, and, as to the rupees 6,000 and odd, had established his case by admissions without it, but that it did operate upon the defendants' case, they having put it in evidence, and that its effect was to prevent them from establishing any set off or deduction beyond the sum of rupees 5,000; and if this argument be correct the plaintiff would certainly be entitled to a judgment for rupees 1,328-4-0. On the other hand, if the restriction in the 27th Section can be held to apply only to the balance ascertained to be due, after setting off the cross demands one against the other, then, in the circumstances of this case, the defendants' claim to rupees 4,541-12-0 would remain unimpeached, and they would be entitled to judgment for that amount under the Procedure Code. In my opinion, however, neither of these views can be adopted. As regards the latter, it would obviously defeat the object of the Legislature, for in ascertaining the balance, both parties would, in effect, be allowed to recover more than rupees 5,000; and validity and effect would be given to the agreement in respect to rupees 6,000 and odd on the one side, and rupees 10,000 and odd on the other.

As respects Mr. Mayne's contention, it seems to me that when the written instrument is once properly brought before the Court, and it appears that the claim, whether of the party by whom it is put in evidence or of his opponent, arise under, and by virtue of, that instrument, then

the 27th Section applies and prevents a recovery by either party of more than the limited amount. When an optional stamp is imposed, a new restrictive condition is annexed to the instrument, by which both parties are bound; if the plaintiff is seeking to recover more than the sum for which the stamp imposed is proper, the Statute gives a defence as to all but the amount for which the stamp is proper. The plaintiff may prove his case by admissions; but this does not preclude the defendants from saying, " We do not dispute those admissions, but we will prove that the claim has arisen under a written contract; that it is stamped with an optional stamp of 25 rupees, and therefore by the 27th Section of the Act, you cannot recover more than 5,000 rupees."

It was said that there is no *issue* raising this question; and that it is so. It is pretty clear that it did not occur to either party or to their legal advisers until the hearing; and though the writing was of course produced and filed by the defendants at the settlement of issues, it was not then looked at, the usual practice in this Court being to reserve all questions as to the admissibility of documents for the final hearing of the suit. However, the point had arisen some days before the hearing of this case came to a close, and it was fully argued before me, so that neither party has sustained any disadvantage by the issue not being raised in the first instance, and I think it proper therefore for deciding the case to add the issue—whether by Section 27 of Act X of 1862, both the plaintiff and the defendants, or either of them, are or is precluded from recovering or setting off any larger sum than rupees 5,000, and I must find that issue in the affirmative.

The claims on both sides being reduced to rupees 5,000,—the plaintiff fails altogether, and his suit must be dismissed with costs. If this result had followed from the provision in the Stamp Act alone, I should not have been inclined to order the plaintiff to pay the defendants' costs, but as, upon a consideration of the whole of the evidence, I think the plaintiff must have failed on the merits, I see no ground for departing from the general rule that the costs should follow the event."

1868.
August 12.
R. A. No. 5
of 1868.

The plaintiff appealed.

O'Sullivan and *Miller*, for the appellant.

The *Advocate General*, for the respondent.

The following is extracted from the Judgment of the Court which was delivered by

SCOTLAND, C. J.—This is an appeal from a decree dismissing the suit brought for the hire of bullocks and drivers supplied under the written contract proved on the trial, during the months of April, May, June and July 1867, and for damages for breach of the contract by reason of the defendants' refusal to employ the bullocks and drivers supplied in the 2nd and 3rd Municipal districts within the town and limits of Madras and their improper termination of the contract. The defendants admitted a debt to the plaintiff of rupees 6,328-4-0, for bullocks and drivers actually supplied, less a sum of rupees 18, the right to which is not now in dispute, and the questions raised by the several issues, substantially stated; are, first, the right of the plaintiff to recover any part of the sum claimed as damages; secondly, the validity of the defendants' claims to set off against the money due to the plaintiff the several sums mentioned in their written statement on account of fines for the months of April, May, June and July 1867, as also rupees 5,280, the loss on the hire of bullocks occasioned by the breach of the contract on the plaintiff's part.

The plaintiff rested his case at the trial on the admission of the defendants without putting in evidence the written contract, but it was tendered and received in evidence on the part of the defendants, and on the first question in issue the learned Judge who tried the case came to the conclusion that breaches of the contract by the plaintiff in the early part of June 1867 had been proved which released the defendants from any obligation to continue the employment of the plaintiff's bullocks and drivers in the 2nd and 3rd districts, and he had consequently no right to damages by reason of the termination of the contract. On the issues relating to the defendants' claims, the learned Judge has decided that the contract was put an end to

from the 7th June, and that the plaintiff is indebted to the defendants on account of fines prior to that date and damages after that date in respect of the loss actually sustained in providing for the supply of other bullocks and drivers, and he has found the amounts of such fines to be rupees 658 and rupees 812, and assessed the damages at rupees 9,400, this amount being made up of the differences between the sum payable to the plaintiff under the contract and the cost of the temporary hire of bullocks and drivers from the 7th of June to the end of July, rupees 4,208 and the increased rate of hire under the new permanent contract from the 1st of August, rupees 5,192.

But the defendants have been held not to be entitled to enforce, and consequently to set off, more than rupees 5,000 on the ground that the contract was only admissible in evidence as an obligation liable to an optional stamp under the 17th clause of Schedule A of the Stamp Act X of 1862, and Section 27 of the Act applied to prevent the recovery under it of a larger sum than (if stated) the optional stamp would have been sufficient to cover, namely, rupees 5,000. The same objection has been held to be an available defence in bar of the plaintiff's right to recover more than that sum, and as a necessary consequence the dismissal of the suit was decreed.

Taking the questions raised in the appeal in the order which appears most convenient for their consideration, the first is whether the decision of the learned Judge on the latter point is wrong. For the appellant (the plaintiff) the contention has been in effect as at the trial; that the case proved by admissions without using the written contract as evidence could not be displaced by an objection to the sufficiency of the stamp, the defendants being in no better position than they would have been if the instrument had been unstamped, and that the insufficiency of the stamp was a defect of proof which affected only the case of the defendants who relied on the instrument. We are of opinion that the decision of the learned Judge is right. The ground on which it has been held that a defendant cannot defeat a plaintiff by the production of an unstamped

1868. August 12. R. A. No. 5 of 1868.

document which was unnecessary to the plaintiff's case is its inadmissibility in evidence for any purpose. As observed by Burrough, J. in *Fielder* v. *Ray* 6 *Bingham* 338 "when the plaintiff's case, has been closed, the defendant is not to get rid of it by suggesting the existence of a writing which he is unable legally to produce." The decision in the case of *Chedambaram Chetty* v. *Karunalyavalangapuly Taver*, 3, *Madras H. C. Reports* 342 proceeds on the same ground. Here the case is very different. The learned Judge ruled that the instrument was sufficiently stamped to render it admissible and once in evidence the defendants were at liberty to avail themselves of any legal objection to the plaintiff's right to recover which it afforded and which was open to them as a defence in the suit ; and if Section 27 of the Stamp Act has the operation which has been given to it, there is no doubt that, *pro tanto*, a legal defence was proved. The point for consideration is whether the Section applies to the debt of the plaintiff. Though in point of amount proved by admission has it not been shewn to be "recoverable by reason" of the written contract, and could the Court adjudge the full amount without holding the instrument valid in respect to that amount ? According to the plaintiff's own claim in the suit, the debt arose under a contract between himself and the defendants, and the admission on which he relied had reference to the same liability, and the instrument produced by the defendants was that contract. It thus became established that the plaintiff was proceeding to enforce a liability imposed by such instrument, and that the Court was determining what was the amount recoverable in respect thereof. The Court therefore could not have decreed a sum in excess of that for which the stamp was sufficient without upholding the validity of the instrument in respect of such sum, in violation of the Section. We are consequently of opinion that the learned Judge rightly decided that the Section was a bar to the recovery by the plaintiff as well as by the defendants of more than rupees 5,000.

[Upon the facts their Lordships agreed with the learned Judge that the plaintiff was not entitled to recover any

damages, but came to the conclusion the defendants were not entitled to claim anything on account either of fines or damages for absence from work between the 7th June and the 1st of August.] Upon the question of set off, the judgment was as follows:—

With respect to the amount of the set off allowed for damages subsequent to the 1st August, the only objection put forward is that the parties intended the forfeiture of the contract to be the single penalty for the breach occasioning it. But there is nothing in the written instrument to warrant such a construction. The power to forfeit was clearly introduced to secure an additional advantage to the defendants, and the damages are the ordinary legal consequence of the breach which caused the forfeiture.

The remaining question is whether the last mentioned amount of damages can be set off, and we are of opinion that the decision of the learned Judge on the point is right, although we are not prepared to go quite the length that he does in resting the case on the ground of mutual credit derived from the intention of the parties as evidenced by the contract. We would rather confine ourselves to saying that the terms of the contract are quite consistent with the claim to the set off, and rest our judgment on the general principle of equitable protection, and we think the principle deducible from the case of *Rawson Samuel,* 1 *Cr* : and *Phil* 161 and the other authorities bearing on the point and acted upon in the recent case of *Waterson* v. *The Wales Railway Company* 2, *Law Reports* C. P. 593. 36 L. J. C. P. 285, is correctly stated in *Clarke* v. *Rutnavaloo Chetty,* 2, *Madras H. C. Reports* 303. The right exists not only when there appears to be mutual debts and credits, but also " where the cross demands arise out of one and the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross suit." Here the cross demands are connected with the same transaction and arose out of one and the same contract, and an amount appeared to be payable from the plaintiff and was capable of being immediately determined in the suit. In truth the case made in the

1868. August 12. R. A. No. 5 of 1868

plaint involved the very question of breach in respect of which the set off was claimed. There could hardly be a much stronger case for equitable protection for a recovery of more than the balance justly due. No purpose would be served by rejecting the set off except simply driving the defendants to bring another suit. But it was said in argument that unliquidated damages are not an admissible subject of set off under any circumstances in equity any more than at common law. That, however, is clearly not so. The decision in *Clarke* v. *Rutnavaloo* does not rest on the ground that claim sought to be set off was one of unliquidated damages, and the cases of *Beasly* v. *Darcy* and *Piggott* v. *Williams* cited in *Rawson* v. *Samuel,* are direct authorities that such a claim may be set off. No doubt the language of the provisions of the Code of Civil Procedure relating to set off is in strictness referable to debts, but we agree in the opinion expressed in *Clarke* v. *Rutnavaloo* that these provisions cannot be considered to have the effect of taking away any right of set off, whether legal or equitable, which existed when the Code came into force, and now that both legal and equitable jurisdictions are vested in the same Court, the admission of an unliquidated demand as a set off does not even necessitate delay in order that the amount may be assessed in a separate suit.

The result of our judgment is to leave the respondents entitled to the two sums adjudged to be due to them for fines incurred by the appellant in the three districts before the 7th of June, amounting together to rupees 1,470, as also to rupees 5,192, the amount of the damages assessed, from the 1st of August, in all rupees 6,662. This exceeds the amount of debt due to the plaintiff by rupees 333-12-0 but as by the operation of the Stamp Act no more than rupees 5,000 can be recovered on either side, the suit has been rightly dismissed, and the decree must be affirmed with costs. There is not sufficient ground to take the case out of the general rule as to costs. The decision given in the appellant's favor on one point does not alter his position under the decree, and on the merits the defendants still have the balance in their favor.

Appeal dismissed.

Appellate Jurisdiction (a)

Special Appeal No. 309 *of* 1868.

ABBAKKU and another.........*Special Appellants.*

AMMU SHETTATI..................*Special Respondent.*

The plaintiff sued the defendants for future and past maintenance and obtained a decree for future maintenance and for arrears of maintenance for seven years. The parties were governed by the Aliyasantana law. It was found by the Lower Appellate Court that for twenty years before the suit the plaintiff lived apart from the defendants and the other members of the family and supported herself without receiving or applying for anything towards her maintenance out of the family property in the possession of the defendants or obtaining any recognition of her right to maintenance.

On special appeal *held*, per *Scotland, C. J.* That assuming the Aliyasantana law recognizes the right of the plaintiff to enforce separate maintenance as a charge upon the estate, the plaintiff's claim was barred by Section 1, Clause 13 of Act XIV of 1859.

Per *Collett, J.* It is doubtful whether Section 13, which applies to cases where the right to receive maintenance is a charge on the inheritance of any estate, applies in a case where the right of the plaintiff is said to exist by reason of her being a co-proprietor with the defendants. If the suit be not within Section 13, then it was one to recover an interest in immoveable property and was equally barred by Clause 12 of Section I of the Limitation Act.

1868. *October* 20. *S. A. No.* 309 *of* 1868.

THIS was a Special Appeal against the decision of the Honorable J. C. St. Clair, the Acting Civil Judge of Mangalore, in Regular Appeal No. 41 of 1867, modifying the decree of the Court of the Principal Sadr Amin of Mangalore in Original Suit No. 78 of 1864.

Parthasárathi Aiyangár, for the Special Appellants, the 3rd and 4th defendants.

This Special Appeal coming on for hearing, the Judges delivered the following Judgments.

SCOTLAND, C. J.—The plaintiff in this case is the sister of the 1st and 2nd defendants, and the 3rd and 4th defendants are her nieces, and she has obtained the decree of the Civil Court of Mangalore in an appeal from the Principal Sadr Amin's Court for the payment by the 2nd, 3rd, and 4th defendants of an annual sum for her future separate maintenance, and an amount on account of arrears of maintenance for seven years. The 3rd and 4th defendants have appealed against that decree and

(a) Present: Scotland, C. J. and Collett, J.

1868. October 20. S. A. No. 309 of 1868.

relied on the single ground that the Act of Limitation (Act XIV of 1859, Section 1, Clause 13,) is a bar to the suit.

The material facts are that the plaintiff and the defendants are members of a family governed by the Aliyasantana law, and for at least twenty years before the suit the plaintiff has lived apart from the defendants and the other members of the family, and has during that time supported herself without receiving or applying for anything towards her maintenance from the family property in the defendants' possession or obtaining any recognition of her right to maintenance. The Principal Sadr Amin decided in favor of the plaintiff, considering that evidence of a demand of maintenance and a refusal to pay shewing adverse possession by the defendants of the family property was necessary to bring the case within the Act; and the Civil Judge rests his decision, modifying the decree of the original Court, on rulings which he states lay down that no lapse of time can affect the right to maintenance except in regard to the recovery of arrears.

Now assuming that the Aliyasantana law recognizes the right of the plaintiff to enforce separate maintenance as a charge on the estate, (a point on which I do not intend to convey any opinion), I think that both Courts have come to a wrong decision on the Limitation Act. The 13th Clause of Section 1 of Act XIV of 1859 applies generally to suits for the recovery of maintenance chargeable on the inheritance of an estate, whether the claim be for past or future maintenance, and it prescribes the times from which the period of limitation is to be computed, namely, " from the death of the person on whose estate the maintenance is alleged to be a charge, or from the date of the last payment to the plaintiff, or any person through whom he claims, by the person in the possession or management of such estate on account of such maintenance." There is nothing in the language of this enactment to require that the person in possession or management of the estate should be shewn to have expressly repudiated the claim of the plaintiff. It makes the period of limitation begin to run immediately on the death of the person whose estate

is alleged to be chargeable, or, when there has been a recognition of the claim by payment, from the date of the last payment. I read the clause as requiring exclusive enjoyment of the estate as respects the interest of the person claiming maintenance, that is separate possession or enjoyment without recognition of any existing interest or right in the claimant for twelve years computed from either of the events mentioned in the clause. This, I think, is sufficient to constitute the bar, although the claimant may throughout the period have abstained from demanding an allowance for maintenance; and in the present case it is clearly found that the defendants have had such a possession and enjoyment of the family property.

We have not been furnished with a reference to either of the rulings relied upon by the Civil Judge, and the only reported decision that I know of bearing on the law of limitation in a case of maintenance is *Venkopadhyaya* v. *Kávari Hengusu*, 2, *Madras High Court Reports*, 36, but that is no authority for the position enunciated by the Civil Judge. The bar of the Act appears not to have been a point for decision in the case, and all that I understand the Court to have laid down is that lapse of time short of the period allowed by the Act of Limitation is not a bar to the recovery of past maintenance.

I am therefore of opinion (that assuming the right as claimed to exist) the suit is barred by the Act of Limitations, and that the decree appealed from must be reversed with costs.

Collett, J.—The circumstances of this case appear to me to be peculiar. The plaintiff is a member of a family governed by Aliyasantana law, and sues her two sisters and the two daughters of one of the sisters for separate maintenance. She is therefore in the position of a proprietor suing her co-proprietors for maintenance. The Court of First Instance found upon the evidence that she had the joint interest claimed by her. The Lower Appellate Court came to the same conclusion, but upon a process of reasoning entirely erroneous and not upon the evidence. Assuming, however, the fact of the plaintiff being a co-pro-

1868. October 20. S. A. No. 309 of 1868.

prietor with the defendants, and assuming also (what however I do not in the least wish to be taken as deciding) that the plaintiff has a right to a separate maintenance to be charged upon and derived in some way from or out of the joint property, the question remains whether her remedy for such a right has not been barred by the lapse of time; and if so, that will be sufficient for the disposal of this special appeal.

Now the finding by the Court of First Instance as to the facts would not, in my opinion, have been sufficient for the decision of this question. That Court expressly rejected the evidence that the plaintiff had been living separately from the defendants for more than thirty years, and did not find for how long and under what circumstances the plaintiff had been living separately, and whether there had been such a possession by the defendants as to be exclusive of the plaintiff. The Court assumed that the plaintiff being a co-proprietor there must have been an express demand and refusal to constitute the defendants' possession hostile. In deciding whether a case is within the latter part of clause 13 of Section 1 of the Act of Limitation the nature of the defendants' possession or management will have to be considered, and it will always, I consider, be a question upon the evidence and the circumstances of the case, whether in the case of a co-proprietor there has been a continuing, actual or constructive possession by the plaintiff jointly with the defendant, or whether the ostensible possession or management of the defendants has in fact been exclusive of and hostile to the plaintiff; and of course such exclusion of the plaintiff may be evidenced in a variety of ways besides by an express demand and refusal. Had the case rested upon the finding of the Court of First Instance, there must have been a remand for a more distinct finding as to the facts. But the Lower Appellate Court has recorded a distinct finding upon this part of the case. The words of the Judgment are:—"It has no doubt been proved that the plaintiff has lived apart from the defendants' family for the last twenty years, and has during that time received no assistance out of the family funds;" but the Court for a reason which

1868. October 20. S. A. No. 309 of 1868.

I agree is clearly erroneous law held that notwithstanding this exclusion of the plaintiff (for clearly the Court by the facts as above found meant that there had been such an exclusion of the plaintiff,) the law of limitation would apply only to the recovery of arrears of maintenance. That is not so clearly, for clause 13 is not concerned with the recovery of arrears due to a co-proprietor or to one having a right to maintenance out of an estate, but with the enforcement of the right itself to a share or to maintenance.

I have dealt with this case on the footing that it is within clause 13; but I entertain great doubt if it is so. It is not a suit for the recovery of a share, for under the special law of the parties it is settled law that no such right exists. And in respect to suits for maintenance, clause 13 is expressed to be limited to "where the right to receive such maintenance is a charge on the inheritance of any estate" an inexact phrase in which a right seems to be substituted for its object matter. Now in this case the right of the plaintiff to receive maintenance (if she has such a right) is not of the nature of "a charge on the inheritance of an estate;" it is not a right of one person to receive a maintenance chargeable on the inheritance of an estate by another person, but it is a right said to exist by reason of her being, and inherent in her joint interest as, a co-proprietor with the defendants to receive a maintenance out of the joint property, and this seems to me quite another kind of right. But if the suit is not within clause 13, then, if the plaintiff's right be as described a part of her proprietory interest in the joint estate, and enforceable as such, it seems to me that it must be an interest in immoveable property within the terms of clause 12, and if so as the cause of action in respect to such interest would arise when the exclusion began and that was twenty years ago, the suit is clearly barred. I agree therefore in reversing the decrees below and in dismissing plaintiff's suit with costs throughout.

Special Appeal allowed.

Appellate Jurisdiction (a)

Regular Appeal No. 2 of 1868.

KATAKAM VENKAIYA .... *Appellant (1st Defendant.)*

BHUPALAM PEDDA MULLASAPPAH...... } ...... *Respondent (Plaintiff.)*

In a suit to recover the balance alleged to be due on a partnership transaction, the 1st defendant who was examined as a witness for the plaintiff refused to produce certain accounts relating to the partnership which he was directed to produce by the Civil Judge. Thereupon judgment was given against the 1st defendant under Section 170 of the Civil Procedure Code.

On appeal, the High Court, holding that the accounts were relevant and material evidence in the suit, and that the Civil Judge was justified in requiring the 1st defendant to produce them, and being satisfied that the accounts were in the possession or control of the 1st defendant, affirmed the judgment of the Civil Judge.

1868. *October* 20. *R. A. No.* 2 *of* 1868.

THIS was a Regular Appeal against the decree of H. E. Sullivan, the Acting Civil Judge of Bellary, in Original Suit No. 6 of 1867.

Gould and *Parthasárathi Aiyangár,* for the Appellant, the 1st defendant.

The Advocate General, for the Respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—In this case the plaintiff sued the 1st defendant and others claiming to have been a partner with them in certain abkarry contracts during Fuslies 1271 to 1275 and seeking to recover the balance alleged to be due upon the partnership transactions. The 1st defendant, who certainly had the management of the contracts in question, denied that plaintiff was interested as a partner therein. Evidence appears to have been gone into to prove the partnership alleged by the plaintiff, and a great number of documents and accounts were produced. The 1st defendant was also called and examined as a witness by the plaintiff, and 1st defendant's late gumastah was also examined as the 10th witness for the plaintiff. The 1st defendant admitted that some of the accounts had been kept by the gumastah and regularly forwarded to him, and

(a) Present: Collett and Ellis, J.J.

as to some others he said that they had been kept by himself but were "not now forthcoming." At this stage of the suit, the Civil Judge required the 1st defendant to produce the accounts, being satisfied, as he states, upon the evidence that they were in his custody and possession. The 1st defendant did not produce them, his excuse being, as recorded in his deposition, that he had delivered the accounts to his gumastah who told him that he had returned them by a servant but that they had never reached him. The Civil Judge, being dissatisfied with this excuse, proceeded under Section 170, Civil Procedure Code, to pass judgment against the 1st defendant.

At the hearing of this and another very similar appeal, we purposely reserved our judgment in order to give the 1st defendant an opportunity to purge his contempt by submitting to the order of the Court and producing his accounts; and it having been objected that the 10th witness had not in his examination denied having received back the accounts from the 1st defendant, we intimated that we might be willing to have the 10th witness further examined on this point. When the case was mentioned again, the further examination of the 10th witness was not pressed for, and the 1st defendant not having produced the accounts required, we have now to say whether we are prepared to interfere with the discretion exercised by the Court below in the disposal of this suit.

That the Civil Judge was justified by the evidence in believing that the accounts were in the possession of the 1st defendant, there can be no reasonable doubt. It was where they should be, and he admitted that he had received some of them regularly in due course from the gumastah and some he had prepared himself. He assigned no reason for their having been sent back by him to the gumastah, who by the way he said had been dismissed by him shortly before the close of Fusly 1275. If the gumastah when examined did not deny having received them back, this was apparently due solely to his not having been examined on the subject at all, and it was open to the 1st defendant, if he had been so minded, to have cross examined him on the point. The only reasonable conclusion is that the accounts

1868. October 20. R. A. No. 2 of 1868.

still are where they ought to be and where they once were, viz., in the custody of the 1st defendant.

Then certainly the Civil Judge was justified in requiring the defendant to produce the accounts: they were relevant and material evidence in the suit. The case was therefore within Section 170, Civil Procedure Code, and that Section gives a Court power in such a case to pass judgment against a recusant party or to "make such other order in relation to the suit as the Court may deem proper in the circumstances of the case." We quite agree with what was said in the case reported in 3, *Madras High Court Reports*, 299, that the power given by Section 170 ought to be used with the utmost caution and forbearance, and we are inclined to think that had this suit come before us originally we might have left the suit to proceed to a further stage before enforcing against the 1st defendant the extreme penalty provided by Section 170. But we can entertain no doubt as to the accounts being in the custody and possession of 1st defendant, and though further opportunity has been afforded he has not chosen to produce them. There is no clear ground, so far as we can gather from all the proceedings in the case which we have examined, on which we can say that even at the stage which the suit had reached in the Court below, the Court exercised the power which is undoubtedly given to it by the law so indiscreetly as to justify the interference of an Appellate Court. We feel bound therefore to decline to interfere and to dismiss the appeal, and we think that the dismissal must be attended with the ordinary consequence of paying the respondent's costs.

Appeal dismissed.

Appellate Jurisdiction (a)

Referred Small Cause Case No. 30 *of* 1868.

APPASAMY PATTAR.................. *Plaintiff.*

P. E. GOVINEN NAMBIAR ... ... *Defendant.*

A defendant in a suit summoned by and examined as a witness for the plaintiff is entitled to protection from arrest on civil process during the time reasonably occupied in going to, attending at, and returning from, the place of trial.

CASE stated under Section 22, Act XI of 1865, by the Judge of the Court of Small Causes of Tellicherry, in Suit No. 1,718 of 1868. 1868. *November* 6. *R. C. No.* 30 *of* 1868.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—The defendant in this case was summoned and examined as a witness for the plaintiff. The decree was for the plaintiff, and on his application immediate execution was issued against the defendant's person. The question which we have to decide is, whether the defendant, being in attendance as a witness, was entitled to protection from arrest.

The well established rule of English Law that a witness or party to a civil suit, whose attendance is required on a trial before a Judicial tribunal, is protected from arrest on civil process during the time reasonably occupied in going to, attending at, and returning from the place of trial, rests on a principle which applies with full force here, namely, that freedom from the fear of arrest encourages willing attendance and thus tends to the advancement of justice. It is therefore a sound rule to be acted upon by the Courts, and we think the present case comes within the rule.

The 18th Section of Act XI of 1865 only empowers Courts of Small Causes to issue a warrant against the person or moveable property of the judgment debtor on a verbal application immediately on the passing of a decree. As respects the execution of the warrant, the rights of the

(a) Present: Scotland, C. J. and Collett, J.

1868. November 6. R. A. No. 59 of 1868.

parties remain precisely the same as in the case of the issuing of a similar warrant on an ordinary written application for execution.

Our answer to the question submitted is that the defendant was entitled to the privilege of a reasonable time for his return home, and the arrest therefore was irregular.

Appellate Jurisdiction (a)

Criminal Regular Appeal No. 59 *of* 1868.

K. Chappu Menon.....................*Appellant.*

An appeal lies against an order of the Session Court imposing a fine upon a witness under Section 228 of the Penal Code for intentional insult to the Session Judge sitting in a stage of a judicial proceeding.

Where the High Court were satisfied that the witness did not intend to insult the Judge the order was set aside.

1868. November 6. C. R. A. No. 59 of 1868.

THIS was an appeal against the sentence of G. R. Sharpe, the Session Judge of Calicut, in Case No. 19 of the calendar for 1868.

Judgment:—The appellant in this case has been fined rupees 70 under Section 228 of the Penal Code for the offence of intentional insult to the Session Judge of Calicut when sitting in a stage of a judicial proceeding. The insult appears from the Court's order to have been "a derisive laugh" immediately on entering the witness box when about to be affirmed, and "pretended inability to articulate a single word," both then and when "a nasty question as to his antecedents was put in cross-examination," which threats of a fine removed.

The appellant at the time declared that he meant no insult, and that the manner observed by the Judge was owing to natural infirmity of articulation. But the Judge considered the excuse insufficient to account for the demeanour exhibited.

The question is whether there are good grounds for the belief that the Judge was led at the moment to form a mistaken impression of the man's intention from his

(a) Present: Scotland, C. J., and Ellis, J.

1868. November 6. C. R. A. No. 59 of 1868.

appearance. He has returned to the inquiry of this Court that the order appealed from contains all that there is on record relating to the contempt, and in it there is nothing to suggest any reason for the appellants being disposed to show disrespect to the Judge or feign or exaggerate natural infirmity of speech; neither does it appear that he made use of improper expressions of any kind.

The laugh and hesitation in speaking were the only two things considered contemptuous. But it is apparent from the order that the Judge himself believed at the time that the appellant was in some degree afflicted with infirmity of utterance, and was influenced by impressions of the appellant's general character derived from inquiries of others, which must have been very strong to have led to the use in the Court's order of the very unbecoming language " his scoundrelly character." This we considered warranted further inquiry, and we have now returned by the Session Court the evidence of two witnesses, who have known the appellant for several years and deposed to his being afflicted with stammering and having a laughing appearance when about to speak. Little reliance would have been placed on this evidence by itself; but from our own observation of the man's manner and appearance when speaking in the presence of this Court, and what appears from the order of the Lower Court, we have a strong conviction that they have stated substantially what is true, and that the Judge has mistakenly supposed, as in such a matter on the mere view he might easily do, that the laugh and hesitation he observed were meant as an insult to him.

We should mention that a doubt having suggested itself as to the right of appeal in such a case, we have considered the provisions of the Code of Criminal Procedure, and are of opinion that the right of appeal is given. The doubt suggested was whether it could be said that there had been " a conviction on a trial" within the meaning of Section 408 of the Code. The proceeding under Section 163 involved the consideration of the sufficiency of what took place in the presence of the Court to constitute a punishable offence, after hearing the statement of the offender; and the Court was bound to record the facts with the statement, as well

1868. November 6. C. R. A. No. 59 of 1868.

as the finding and sentence. It was therefore clearly a trial although by a summary mode and on the view of the Judge.

It is true that Section 408 specially mentions the two instances of trial with the aid of assessors, and trial by jury, but not so as to exclude the application of the general words "any person convicted on a trial held by a Court of Session," to a trial in another way. A man arraigned, pleading guilty and convicted on his plea, has clearly been convicted on his trial within the meaning of Section 408.

Further, Section 413, which expressly gives an appeal from a conviction for the offence in this case by a Civil Court, shows clearly that the Sections were intended to apply to a conviction by a Criminal Court. Were it otherwise, there would be this anomaly that a conviction by a Judge would be open to appeal when made in the exercise of his Civil but not his Criminal jurisdiction.

The order therefore must be set aside and the fine refunded.

It is accordingly ordered that the sentence of the said Court of Session be, and the same hereby is, reversed; and that the fine be refunded.

Appellate Jurisdiction (a)

Regular Appeal Miscellaneous No. 57 *of* 1868.

Y. VIRABHADRA RAU against M. RAMAIYA *alias* BABPAUTULA.

Application for execution of a decree obtained in 1858 under the old law as to limitation was made in January and disposed of in February 1864, and a subsequent application was made in November 1867.

Held, that the first application was in time, but the second application was barred by Section 20, Act XIV of 1859.

1868. November 13. R. A. M. No. 57 of 1868.

THIS was a Regular Appeal against an order of E. B. Foord, the Civil Judge of Berhampore, dated 15th November 1867, rejecting an application for the execution of the

(a) Present: Scotland, C. J. and Collett, J.

decree passed by the late Civil Court of Chicacole in Original Suit No. 141 of 1850. 1868. November 13. R. A. M. No. 57 of 1868.

Parthasárathi Aiyangár, for the petitioner.

The Court delivered the following

JUDGMENT:—The decree was dated the 23rd October 1853. From that date under the old law the plaintiff had twelve years within which to execute the decree. In January 1864 he took proceedings to enforce execution. Under Section 21 of the new law, he had then as much of the twelve years as remained unexpired, not exceeding three years from 1st January 1862. The application in January 1864 was therefore in time, but the subsequent application in November 1867, being more than three years after that in January 1864, and nothing having been done between the 29th of February 1864 and the 11th November 1867 to keep the decree alive, it was barred under Section 20 of the Limitation Act. It has already been decided, though the case has not yet been reported, that an application for a certificate under Act XXVII of 1860 is not a proceeding to keep alive a decree within the meaning of that Section (See Judgment in Civil Miscellaneous Special Appeal 73 of 1868.* The order of the Civil Judge must therefore be confirmed and this appeal dismissed.

Appeal dismissed.

Appellate Jurisdiction (a)

Referred Case No. 32 of 1868.

WUMADAI RAJAH HARAJAI KUMARA VENKATA PERUMAL-RAJ BAHADUR, ZEMINDAR OF KARVATINUGGAR, against KANNIAPPAH, a Ryot.

A suit for rent is maintainable where a puttah in the form required by Section 4, Act VIII of 1865, (Madras), and such as the defendant was bound to accept has been tendered to the defendant, although no attempt has been made by a summary suit before the Collector to enforce its acceptance.

A District Munsif is a Small Cause Court Judge under Madras Act IV of 1863 within Act XI of 1865.

THIS was a case referred for the opinion of the High Court by W. Ramasamier, the District Munsif of Sholungur, in Suit No. 315 of 1868. 1868. November 18. R. C. No. 32 of 1868.

* See ante page 89.

(a) Present: Scotland, C. J. and Collett, J.

1868. November 18. R. C. No. 32 of 1868.

Miller and *Srinivasa Chariyar,* for the plaintiff.

Mayne and *Sanjiva Row,* for the defendant.

The suit was brought by the plaintiff to recover rupees 25-10-5 with interest, being the amount of arrears of rent alleged to be due by the defendant for lands cultivated by him in the plaintiff's zemindary in 1866-67. A puttah had been tendered by the plaintiff to the defendant, but the defendant refused to accept it.

The question put by the Munsif was whether the plaintiff could bring the present suit for the recovery of arrears of rent due by the defendant who had not accepted the puttah without first proceeding against the defendant under Section 9, (Madras) Act VIII of 1865 in a summary suit before the Collector to enforce the acceptance of the puttah.

The Court delivered the following

JUDGMENT:—On this case coming on to be heard, the rather startling preliminary objection was raised for the defendant that a District Munsif is no longer under Madras Act IV of 1863 a Small Cause Court Judge within Act XI of 1865. But if the proviso in Section 2 of the latter Act does not preserve his double jurisdiction, the argument based on Section 13 read with Sections 40 and 51 would, pushed to its full length, lead to the result that if he is deprived of either jurisdiction it is that of District Munsif, and not as a Court of Small Causes. This case therefore is properly referred under Act XI of 1865, and we need not say whether the other jurisdiction as District Munsif does not also exist.

As regards the question referred for our opinion, we understand from the statement of the case that it was proved to the satisfaction of the Munsif that a puttah in the form required by Section 4 of Act VIII of 1865, and such as the defendant was bound to accept, had been tendered to the defendant by means of service of it in one of the modes pointed out in Section 39, and that being so, we are of opinion that the suit is maintainable. Sections 8 and 9 provide landholders and tenants with a summary remedy to enforce the exchange of puttahs and muchilkas, but the plaintiff was

not bound to have recourse to it before he instituted the suit, for, by the express terms of the prohibitory provision in Section 7, a sufficient tender of the proper puttah and an exchange of a puttah and muchilka are made alternative conditions of the right to bring a suit.

1868. November 18. R. C. No. 32 of 1868.

Appellate Jurisdiction (a)

Referred Case No. 29 *of* 1868.

VARADA CHETTY.............................*Plaintiff.*

VAIYAPURY MUDALI......................*Defendant.*

The filing of an application for execution is a proceeding within the meaning of Section 20, Act XIV of 1859, sufficient to give the decree-holder a new period of three years.

CASE stated under Section 22, Act XI of 1865, by the District Munsif of Tripatur in Suit No. 283 of 1864.

1868. November 25. R. C. No. 29 of 1868.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—The question referred to us is whether the filing of an application for execution of a decree is a proceeding within the meaning of Section 20 of the Law of Limitation, sufficient to give the decree-holder a new period of three years.

The issuing of process of execution is clearly not necessary to save the bar of the limitation provided by Section 20 of Act XIV of 1859. The right to take a proceeding simply for the purpose of keeping the decree in force is plainly recognised by the Section and given the same force as process to enforce the liability under it.

We are therefore of opinion that the filing in this case of the written application for execution, in the form required by Section 212 of the Civil Procedure Code, was a proceeding to keep the decree in force within the meaning of the Section.

(a) Present: Scotland, C. J, and Collett, J.

Appellate Jurisdiction (a)

Criminal Regular Appeal No. 157 *of* 1868.

RAMASAMY........................ ....*Appellant.*

To constitute the offence of escaping from transportation under Section 226 of the Penal Code, it is essential that the convict should have been actually sent to a penal settlement and have returned before his term of transportation had expired or been remitted.

Where a prisoner had escaped from custody whilst on his way to undergo sentence of transportation.

Held, that he had committed an offence punishable under Section 224 and not under Section 226 of the Penal Code.

1868. *December* 2. *C. R. A. No.* 157 *of* 1868.

APPEAL by the prisoner against the sentence of the Session Court of Tinnevelly. The charge was that prisoner, having been lawfully transported under sentence of the Session Court of Tinnevelly, returned from such transportation, the term of such transportation not having expired and his punishment not having been remitted. The prisoner admitted that he was the man transported, and that he returned, having escaped on the road to Salem. He was sentenced to transportation for life under Section 226 of the Penal Code.

No counsel were instructed.

The Court delivered the following

JUDGMENT:—We are of opinion that the sentence in this case is illegal. By his confession the prisoner is shown to have escaped from the custody of the Police within the district of Salem, when under sentence of transportation for the offences of house-breaking and theft and whilst on his way to undergo such sentence. He was guilty therefore of the offence, punishable under Section 224 of the Penal Code, of escaping from custody in which he was lawfully detained for an offence of which he had been convicted, and not of the very serious offence punishable under Section 226. To constitute that offence, it is essential that the convict should have been actually sent to a penal settlement and have returned before his term of transportation had expired or been remitted.

The prisoner ought to have been charged and convicted under Section 224, and we must modify the sentence. We think the punishment should be reduced to two years' rigorous imprisonment, to take effect at the expiration of the period of the former sentence.

(a) Present: Scotland, C. J., and Collett, J.

Appellate Jurisdiction (a)

Referred Case No. 3 *of* 1868.

SAMINATHAIYAN..*Plaintiff.*

SAMINATHAIYAN...*Defendant.*

Where a written instrument purported to create the relation of landlord and tenant for five years, the plaintiff's (lessor's) tenure being that of a mirassidar, that is, a hereditary tenancy under Government determinable on default in payment of the proportion of the Motha Faisal assessment payable for the land.

Held, that the instrument did operate to create the relation of landlord and tenant, notwithstanding that the assessment was not permanently fixed.

Held also that the written instrument was a lease, and was not liable to be stamped by virtue of the exemption to Article 42, Schedule A of Act X of 1862.

CASE referrred for the opinion of the High Court by J. H. Nelson, Judge of the Court of Small Causes at Combaconum, in Suit No. 57 of 1868. 1868. October 5. R. C. No. 3 of 1868.

No Counsel were instructed.

The following is the case as stated:—

"Plaintiff appears to be an ordinary ryot entitled to occupy certain Government lands on the usual ryotwari terms, that is to say, he is permitted by Government to occupy the lands from year to year so long as he shall pay the present rate of assessment on them, or whatever rate Government may hereafter think proper to impose.

"Defendant has obtained from plaintiff an assignment of the above right of occupancy for a term of five years in consideration of his delivering to plaintiff a certain quantity of paddy every year, the said assignment having been made either through the medium of a writing produced to the Court by the defendant, and dated the 22nd of May 1865, or of a writing produced by the plaintiff and dated the 3rd of July 1865.

"The action was brought to recover Rupees 160, being money claimed to be due to plaintiff by defendant partly as rent under a writing in the nature of a lease, produced as aforesaid by the plaintiff, and partly as damages occasioned by defendant's non-payment of the said rent.

"The following is a translation of the said instrument:—

(a) Present: Scotland C. J., and Ellis, J.

1868. October 5. R. C. No. 3 of 1868.

"'The 21st day of Ani in the year Krothana, lease-deed executed to Saminathaiyan, merassidar of Kallure Eluveli Kattai, Combaconum taluq, by Saminathaiyan, son of Durmarajaiyan, living in Vijithrarajapuram, in the said taluq.

"'I have rented for 5 years, from 1st Chithrai of Krothana to 30th Punguni of Sukla ensuing, 4 velies and odd of mulguzari one crop nunjah, forming the Elaveli Kattai, situate to the east of Ookadai Abhirami Kattai nunja, in the village of Kallore, in the manner hereunder specified. That is to say :—

"'Every year in Masi or Punguni as soon as the harvest is over, I shall deliver without damp or chaff good grain, measuring by the correct measure on the threshing floor at the rate of 400 kalams of samba paddy for the year Krodana and 490 kalams for each of the years from Atchaiya to Sukla. I shall give yearly 50 bundles of straw, whether in the said lands the produce be larger or smaller, whether I cultivate them or not, or to whatever extent I lay waste, without any excuse. I shall anyhow make good the delivery of the paddy and straw due for each year. I alone shall pay the parakudivaram, and the dues usually paid to village artisans, &c. I alone shall answer for all demands made for labor on account of water-supply, public exigency, &c. Should default be made any year in the payment of rent, or should any arrears stand due to you, the value of the same at the rate at which the paddy should sell in such year, shall be paid to you by me with interest at 1 per cent. per mensem from the 1st of Chithrai following on the security of my estates in the aforesaid village of Vijithirajapuram. Should it in any of the five years, for which the lease is to run, appear that, owing to public calamity, the lands will not yield produce enough to pay the stipulated rent, you will in such year be present at the time of harvest, and after paying the parakudivaram, and making over the straw to me, take to yourself the remaining produce. After the expiration of the five years, you will, at your pleasure, enter the whole lands and carry on cultivation, &c. on them as you like without insisting upon my putting you in possession of them, and I will not afterwards interfere with them. Payments made towards rent shall be endorsed on this deed, and any other acknowledgment of the same shall not be admitted. The nunjah lands shall have only one crop in a year. Thus have I Saminathaiyan, son of Durmarajaiyan, of Vijithirajapuram, executed this lease-deed to Saminathaiyan, merassidar of Elaveli Kattai, out of my own free-will and consent.'"

(Signed) "SAMINATHAIYAN."

1868. October 5. R. C. No. 3 of 1868.

Defendant pleaded, amongst other things, that this document should have been stamped, being a lease; and not having been stamped, could not be admitted in evidence. On the other hand, plaintiff contended that the document required no stamp, being exempted under Article 42 of Act X of 1862, which provides for :—

"' Any lease executed to a ryot or other actual cultivator, provided that no fine or premium be paid as part of the same transaction."

(For Madras.)

" Every lease or other engagement executed between landlord and tenant, relative to land in the Presidency of Madras, subject to the payment of revenue to Government.' "

"The question for the opinion of the High Court is, whether the writing produced by the plaintiff in support of his claim is an instrument which needed to be stamped as a lease with reference to Article 40 of Schedule A of Act X of 1862. Should the High Court be of opinion that it needed to be so stamped, the plaintiff is to be ordered to pay into Court the proper amount of the stamp prescribed for a lease for a period of more than one year, and of which the rent for one year exceeds Rupees 250, but falls short of Rupees 500, together with a penalty of twenty times the value of the stamp; and in default the instrument is to be pronounced to be inadmissible in evidence."

The Judge was of opinion that the instrument ought to have been stamped with a-four rupee stamp, and for the following reasons :—

"1. Plaintiff is not a landlord within the meaning of the words of exemption inserted for the special benefit of the Madras Presidency.

"2. The assignment was not a lease within the meaning of the words creating the general or special exemption, but was merely a transference to the defendant for a certain term of such limited right of occupancy as plaintiff possessed.

"3. When the conveyance was effected, plaintiff and defendant did not stand in the relation one to another of landlord and tenant within the meaning of the words of special exemption for Madras; but that relation was created (if at all) by the instrument executed by the former to the latter.

"With regard to the first of these positions, there can be no question, I believe, but that the legislature have never regarded as landlords ryots paying either to Government or to Zemindars rates of assessment on the land, varying from perhaps the value of one-tenth to one-half of the produce

1868. October 5. R. C. No. 3 of 1868.

raised on their lands, and which may be raised by Government at pleasure wherever a "permanent assessment" has not taken place. But where the term "landlord" occurs in legislative enactments affecting the position and powers of zemindars, ryots, and farmers generally, it is always, if I am not mistaken, applied to such as pay to Government if anything *peishkush* or tribute in some shape, and is never applied to such as pay the ordinary land-tax.

"If I am right in so thinking, it is of course reasonable to suppose that the term "landlord" is used in the clause of exemption in its ordinary sense, and that consequently plaintiff cannot be held to be a landlord within the meaning of the proviso specially applicable to this Presidency. And if I am wrong in so thinking, I still adhere to my opinion with regard to the meaning of the exemption, and am content to base it upon the commonly received meaning of the term landlord. It seems to me that a man who is entitled to the *possession* of a particular field only so long as he shall pay a rate of assessment to another, which rate may be augmented at will by that other, cannot in any circumstances be deemed to possess the *plenum dominium* of that field, or indeed any the most limited form of *dominium*.

"4. I now come to the question, does the instrument amount to a lease within the meaning of the words creating the general and special exemptions? It seems to me that it does not. The legislature has never to the best of my belief contemplated the possibility of leases being granted by any but Government, and large proprietors being zemindars and others who pay tribute and not the ordinary rates of assessment; and if so, then the leases provided for in the exemptions are leases granted to ryots or other actual cultivators by Government or by zemindars, and not by one ryot to another.

"5. And if I am wrong in so thinking, I am nevertheless of opinion that looking to the plain meaning of the words of the general and special exemptions taken together, the term "lease" must clearly be held to mean a power granted to a ryot by some one having higher rights than a ryot, and not by a ryot to another individual.

"6. Lastly, I have to pronounce upon the question, did the plaintiff and defendant stand in the relation one to the other of landlord and tenant within the meaning of the words creating the general and special exemptions? And I feel but little hesitation in deciding that they did not. Looking to the words of the special exemption as they stand, and to the general scope of the Revenue Regulations which I must presume the legislature to have had in view when framing the Stamp Act, it appears to me that the exemption must be held to apply to the cases of engagements as between persons who stand already in the positions of

landlord and tenant, in the sense in which those terms are used in the Revenue Regulations, at the time when those engagements are entered into, for instance as between Government and ryots or zemindars and ryots, and not to the cases of engagements of persons who may by the act of entering into such engagements bring themselves into the relation of landlord and tenant for certain purposes as between themselves; in other words, I, think that the exemption is applicable to a case where a Collector or a zemindar enters into a written engagement with a ryot to receive and pay rent; and not to a case where a ryot occupying lands under a puttah from Government or a zemindar, transfers his limited right of occupancy to another for a term.

"7. If this view be adopted, the provisions of Schedule A in respect of stamps for leases are made perfectly reasonable and consistent. Stamps will then be required in all cases where parties grant leases who are not either the Collectors, on behalf of Government, or proprietors who have been assessed with a permanently fixed tribute, which ought not to be increased by indirect means.

"8. For these reasons, I am of opinion that the instrument in the nature of a lease put in as evidence by the plaintiff in this suit ought to have been stamped under the provisions of Article 40 of Schedule A of the Stamp Act."

A further statement was furnished by the Judge in pursuance of an order made by the High Court, from which the following is extracted:—

In the technical revenue phraseology of the district of Tanjore, plaintiff was, at the time when the instrument in question purports to have been executed, a merassidar in occupation of, and liable for, the assessment on a certain "share" of the Government village of Kallure which was formerly *Kareiyidu*, but is now *Atchandrarkam*, the said assessment being at this present time calculated with reference to the provisions of the temporary local revenue settlement known as the *Motha Faisal*.

In order to exhibit fully the meaning of this definition and the nature of the tenure by which plaintiff holds his lands, it will be necessary to explain one by one each of the terms above made use of.

A mirassidar is one who holds a miras. The Arabic term miras, which according to *Bailie (see his Land Tax of India, Introductory Essay*, p. 32*)*, is a term peculiar to Southern India, appears to have been introduced into

1868. October 5. R. C. No. 3 of 1868.

Tanjore by the Government of the Nabob Wallajah when he obtained a temporary possession of the country in 1774 and 1775. It was unknown to the Mahratta Rajahs and fell into disuse immediately upon their restoration to power in 1776. It was re-introduced by an English Collector in 1800. According to *Bailie* the term is used in Southern India " chiefly to designate a variety of rights differing in nature and value, but all more or less connected with proprietary possession or usufruct of the soil, or of its produce; as (among others) the right of the permanent cultivator to the hereditary usufruct of the land."

A little further on *Bailie* says:—"It seems probable that the *Koodkasht* ryot of Bengal and the *miassidar* of Southern India never were the proprietors of the land; but that there originally stood between them and the ruling power another party, who was the true *Rubbool Arz*, or lord of the land, and that they were only his *Moozaoreas*, who in the course of time had acquired by custom the vague rights which they are still supposed to possess. It will be seen hereafter how this intermediate party continued to hold his ground and to increase in strength in Bengal, while he may have been forced by oppression to abandon the land in Southern India, and the ruling power itself came, in consequence, to be instituted in his place as the proprietor."

So much for *Bailie*, whose authority in these matters is very great. The present Collector of Tanjore, whose knowledge of the district is the result of some fourteen years' revenue experience of it, is of opinion that the term *miras* means in Tanjore a permanent usufructuary occupancy of land, subject to the payment of the Government demand, which may be transferred at will by sale, mortgage or otherwise. He is further of opinion that Government is the lord of the soil, and that Government may legally raise the rent of the land to any height it may think proper.

I come to the next term which requires explanation *A share* means a certain fractional part of the lands which constitute a village. In ancient times most of the nunjah villages of the district were, for convenience sake, divided into a number of equal portions or " shares" by their occupants and distributed amongst them for cultivation, and

where this was done, the assessment payable by each mirassidar is fixed on his shares, share, or sub-division of a share, and not on the actual measurement of land in acres or otherwise which he may happen to occupy.

A *Kareiyídu* village is one in which it is the custom for the occupants to effect a re-distribution of shares periodically, A taking B's share, B taking C's, C taking D's, and so forth. An *Atchandrarkam* village is one in which the above custom never existed or has died out, and the shares are not periodically re-distributed.

The Motha Faisal assessment is the latest modification of the system gradually introduced by English Collectors.

In 1800 three systems of collecting the land-tax were in vogue, viz:—

1. The *Varapot*, or equal division of the gross produce of each holding effected after a certain small portion had been set aside for *swatantrams*.

2. Settlements in gross with the headmen of each village.

3. The *Pathakam* system above described.

Of these three the last was forthwith discontinued, and the second did not long survive. After a few tentative systems had been tried, the system known as the *Olungu* was generally introduced by Mr. Cotton about the year 1822. Under that all the lands of each village were classified as either nunjah, punjah, or garden, and assessed accordingly with uniform rates amounting to about 45 per cent. of their ascertained average produce. The tax was assessed separately on each share or sub-division of a share, so that each individual cultivator might pay his tax directly to Government, and was collected in money, the commutation prices of grain and garden produce being fixed for each *Mahanam* (small group of villages) by the Collector at the close of each official year.

This system was simplified in some villages in 1830 by the substitution of a fixed for fluctuating commutation

1868. October 5. R. C. No. 3 of 1868.

rates of price, and in 1859-60 this plan was very generally adopted throughout the district. It is known as the Motha Faisal.

The Motha Faisal is well known to be only a temporary settlement, but that there may be no doubt about the matter it is expressly explained in each *muchilkâ* or counterpart of a lease given to the Collector by a cultivator of Government lands that the terms of the lease will hold good only until a new settlement shall supersede the Motha Faisal.

Very few mirassidars cultivate themselves the lands they occupy. They generally let them out to poorer men, *parakudis*, with whom they divide the produce or its value. The Collector states that the shares of produce which fell to the circar, the mirassidar, and the parakui severally, at the time when the British system was first formed at the beginning of this century, were as follows, viz:—

Of every 100 *kalams* of grain 10 were set aside as swatantrams.

45 went to Government, 23 went to the parakudi or immediate cultivator, 22 remaiued to the mirasidar.

The extraordinary rise in the prices of all commodities has made the 22 per cent. of the mirassidar far more valuable for the present than the 45 per cent. of Government, but it is in the power of the latter to redress this inequality at any moment, and the position and profits of the mirassidar depend altogether upon the pleasure of his landlord, the only real landlord of ordinary land in Southern India, the State.

The Court delivered the following

JUDGMENT:—The written instrument set out in the case purports to create the relation of landlord and tenant for five years. The question is whether it really so operated. The Judge seems to have dealt with the case on two views, First, he appears to have been in some measure influenced by the consideration that the plaintiff's right in the land hardly admitted of the creation of a tenancy under him, and that the instrument operated simply as a transfer:

secondly, he has construed the exemption from Article 40, Schedule A, Act X of 1862, as applicable only to contracts of letting between the Collector, on behalf of the Government, or between private proprietors, such as Zemindars, whose lands have been assessed with a permanent peishcush.

1868. *October 5.* *R. C. No. 3 of 1868.*

With regard to the first of these views, we think there is no room for doubt. The law does not prohibit any tenant placing himself in the correlative position of landlord to a sub-tenant, and the question whether such a position has been acquired depends in each case upon the tenant's right in the land and the contract made. If a tenant, being at liberty to part with his possession and enjoyment, does so in consideration of a certain rent, but not to the whole extent of his legal interest, so that the right of possession will at once revest in him or his representatives on the termination of the sub-contract, he stands in the relation of landlord during the subsistence of such contract; and that clearly was the position of the plaintiff in this case.

What we understand from the instructive statement of the case to be the material facts found by the Court is, that the plaintiff's tenure was that of a "mirassidar" according to the understanding of the term in Tanjore, that is, he held an hereditary tenancy under the Government, determinable on default in payment of the proportion of the " Motha faisal" assessment payable for the land, and was subject to no restriction in regard to the disposition of his right and interest, and having such permanent right he parted with the land for a limited period. The written instrument, therefore, did operate to create the relation of landlord and tenant between him and the defendant for the limited term of five years. It makes no difference that the assessment was not permanently fixed. That is a circumstance connected only with the burthen of the condition on which the land is held, and did not alter the nature of the tenancy.

Then as to the construction of the exemption to Article 40, Schedule A, Act X of 1862, the language is quite general, and we see nothing in the Act tending to shew

(a) Present Scotland, C. J, and Ellis, J.

1868. October 5. R. C. No. 3 of 1868. that the legislature meant the words "lease" or "landlord and tenant" to be applied in a more restricted sense than their ordinary legal meaning. Subject to the qualification expressed in the exemption, the word "lease" must have the same meaning as it has in Article 40. If the relation of landlord and tenant had not been created by the written instrument, it would not have been a lease. But, creating that relation, as we think it did, it is a lease within the meaning of the exemption, and therefore not liable to a stamp under Article 40. For these reasons we answer the questions submitted in the negative.

Appellate Jurisdiction (a)

Criminal Petition No. 121 *of* 1868.

RANGASAWMI GOUNDEN..................*Petitioner.*

SABAPATHY GOUNDEN and 5 others...*Counter-Petitioners.*

A Magistrate is bound at least to examine a complainant before he can exercise the discretionary power to issue process or dismiss the complaint which is given to him by Section 67 of the Code of Criminal Procedure.

1868. November 2. C. P. No. 121 of 1868. THIS was an application under Section 404 of the Criminal Procedure Code praying the High Court to call for the proceedings in the case referred to in the order of the Deputy Magistrate of Namkul division, Salem district, dated 23rd January 1868, and to direct that the complaint of the petitioner may be inquired into and disposed of according to law.

The petitioner stated, in a verified petition, that his office, which adjoined his house, was entered on the night of the 28th December 1867, and property of the value of Rupees 54,000, consisting of jewels, bonds, securities, and money, taken away. Each of the doors of the office had two padlocks owing to disputes which then existed between the petitioner and his three undivided brothers regarding the family property, and all the locks were broken in effecting an entrance. On the 29th of December a report of the occurrence was made to the Police Inspector of Trichengode, distant from petitioner's house about fifteen miles,

(a) Present: Scotland, C. J. and Ellis, J.

No report was made to the Village Munsif, because he was one of six persons charged with the offence by the petitioner. On the 31st December the Inspector of Police arrived at the petitioner's house and searched the house of one of the persons charged, and some property was found, which the petitioner identified as part of the stolen property, but only one house was searched. On the 1st January 1868 the Head Constable, who remained in petitioner's village after the Inspector had left, applied to the Deputy Collector and the Subordinate Magistrate for warrants for the arrest of the persons charged and to search their houses. No warrants were given. On the 4th of January the petitioner made a complaint in writing to the Deputy Collector as a Magistrate, and the Deputy Collector, on the 7th of January, referred the inquiry to the Subordinate Magistrate of Trichengode. The Police Inspector, in his charge sheet, dated the 8th of January, expressed his opinion that the charge was not well founded. On the 9th of January the petitioner complained in writing to the Deputy Collector of the manner in which the Inspector of Police had dealt with the case. On the 13th of January the Deputy Collector issued notices to the complainant and the persons accused requiring their attendance before him, and such attendance was given on the 15th of January. On the 15th of January neither the complainant nor any of his witnesses was questioned or examined by the Deputy Collector, although they waited in his Office the whole day. The Deputy Collector made no inquiry of any sort in the presence of the complainant. The complaint was dismissed by the Deputy Collector on the 15th of January. On the 16th of January the petitioner applied to the Deputy Collector for a copy of the sentence or order. On the 23rd January the Deputy Collector made an endorsement upon the petitioner's application stating that he had orally examined some persons and found the case unworthy of belief. Three petitions were presented by the petitioner to the Session Court of Salem praying for the interference of that Court, or that the Session Judge would submit the case to the High Court. The applications were refused.

1868. November 2. C. P. No. 121 of 1868.

Snell, for the petitioner.

Gould, for the counter-petitioner.

The Court delivered the following

JUDGMENT:—As this case is now presented to the Court, we are of opinion that the Deputy Magistrate has dealt with it in an irregular manner.

The Inspector of Police having recorded, as the result of the legal inquiry which he had made, that the charge was not in his opinion well founded, the complainant and now petitioner presented a written complaint of the offence to the Deputy Magistrate in order to his proceeding to require the attendance of the accused persons and hear the case. This took place on the 4th January, and on the 7th the Deputy Magistrate appears to have referred the complaint for inquiry before a Subordinate Magistrate (whether because of the opinion recorded in the "referred charge sheet" is not clear), and on the 9th January the complainant was given notice to attend before the Subordinate Magistrate. But further proceeding in the matter was interrupted by the Deputy Magistrate's issuing, on the 13th January, notices requring the attendance before him on the 15th of the complainant, and also it seems of his witnesses and the accused, and so in effect withdrawing the case from the Subordinate Magistrate. The complainant and his witnesses accordingly attended and remained in attendance all day. But the Deputy Magistrate, without examining either of them, dismissed the complaint, recording that on the "oral examination of some persons" he had found the case unworthy of belief, and that he had accepted the report of the Police.

We are of opinion that the Deputy Magistrate, on the presentation of the complaint, ought to have complied with Section 66 of the Code of Criminal Procedure, or allowed the Subordinate Magistrate to do so, and that until he had at least examined the complainant, he was not in a position to exercise the discretionary power to issue process or dismiss the complaint given by Section 67. On the report of the Police being submitted, the Magistrate might make any inquiry

and order he thought proper; but the Inspector's opinion therein expressed did not affect the complainant's right to make his complaint before the Deputy Magistrate, nor, we think, warrant its being dealt with otherwise than it would have been if there had been no such report. We have no reason to believe that the case is one in which a summons or warrant should have been issued. Probably it is not; but there has been a material miscarriage in procedure which the petitioner is entitled to have set right. There must be an order setting aside the Magistrate's proceeding and directing him to take the examination of the complainant on his attending for that purpose, and thereupon to proceed, or to dismiss the complaint, as he is empowered to do, by Section 67 of the Code of Criminal Procedure.

1868. *November* 2. *C. P. No.* 121 *of* 1868

Appellate Jurisdiction (a)

Special Appeal No. 206 *of* 1868.

V. SINGAMMA and another... ...*Special Appellants.*

VINJAMURI VENKATACHARLU, natural father and guardian of SRINIVASA CHARLU *alias* RAMANUJA CHARLU........... } *Special Respondent.*

In order to establish a valid adoption in a Brahmin family, proof of the performance of the datta homam is not essential.

The giving and receiving a boy who is capable of being adopted is sufficient to constitute a valid adoption according to Hindu Law.

THIS was a Special Appeal against the decree of G. D. Leman, the Acting Civil Judge of Guntoor, in Regular Appeal No. 86 of 1865, confirming the decree of the Court of the District Munsif of Bapatla in Original Suit No. 736 of 1864.

1868. *November* 23. *S. A. No.* 206 *of* 1868.

Parthasarathy Aiyangar, for *Rama Row*, for the special appellants, the 1st and 2nd defendants.

The facts sufficiently appear from the following

JUDGMENT:—This was a suit to recover certain inam lands which had been alienated by the 1st defendant to the 2nd and 3rd defendants. The plaintiff sued as the

(a) Present: Bittleston and Ellis, JJ.

1868. November 23. S. A. No. 206 of 1868.

adopted son of 1st defendant's deceased husband, the alleged adoption having been made by her under authority from her husband. The adoption was denied, but both the Lower Courts have found that an adoption in fact took place.

When the case came first before this Court on special appeal, we considered the finding of the Lower Appellate Court ambiguous, and accordingly we sent the case back to the Civil Judge for a distinct finding upon the issue, whether there has been any valid adoption of the infant plaintiff according to Hindu Law. This issue has now been found by the Civil Judge in the affirmative; but he adds that it was not proved that the datta homam or any other ceremony, except giving and receiving, was performed at the time of the adoption; and the ground of special appeal is that the adoption, even if true, is invalid, inasmuch as the datta homam was not performed. It is necessary therefore for us to decide in this case whether in order to establish a valid adoption in a Brahmin family, proof of the performance of the datta homam is essential; and, upon a consideration of the authorities, we are of opinion that it is not.

In the two celebrated treatises on adoption translated by Mr. Sutherland (the *Dattaka Mimansa* and *Dattaka Chandrika)* the observance of the prescribed solemnities (including a burnt sacrifice and recitation of the prayers denominated Vyakrit,) is certainly treated as essential to the validity of the adoption, and to the establishment of the filial relation, in the case at all events of the son given. But the writers of these treatises depend mainly upon the texts of *Vasishta* and *Cannaka* as the authorities for their position, and these texts enjoin in similar terms the observance of various other solemnities on the occasion of an adoption, some of which appear not to be regarded as essential by any commentator.

And in the *Digest* of *Jagannatha* there is a very elaborate commentaryon this very text of *Vasishta,* in which he concludes that the oblation to fire with holy words from the Veda is an unessential part of the ceremony. In the Madras edition (1865) of Mr. Colebrooke's translation at p. 389, the passage will be found in which *Jagannatha* states

that the adoption is not void if that oblation be omitted; and at p. 391, this passage " If the declared intention be expressed in these words, ' I give him to you as a son, and if the acceptor's intention be thus expressed, ' I take him as a son' he becomes a son; nothing else is required."

This view of the subject has long been entertained by the principal English authorities. *Sir T. Strange* in his Judgment in *Veerapermal Pillay* v. *Naraina Pillay* 1 *Notes of Cases, p.* 117, says " The operative part of the ceremony seems to be the giving and receiving, the rest is matter of customary solemnity, of decorum, of charity and conviviality varying under different circumstances in different parts of India, or at least in the idea of different Pundits and Shastrees, but one opinion is common to all which is indeed frequently repeated in the late translated digest, viz., that nothing of this kind is so essential to the act as, being mistaken or omitted, can have the effect of invalidating the adoption." In another part of the same judgment at p. 133, with reference to the question as to the proper age of the child he says:—" This question of age appears to have undergone a good deal of investigation in the late case of the Rajah Nobkissen at Bengal, in which the mere act of giving and receiving seems to have been considered as alone constituting a valid adoption without regard to limitations or ceremonies as in any degree essential *unless in the case of Brahmins;*" and the same learned Judge in his work on Hindu Law (we quote from the edition of 1830 p. 95) says further:—" There must be gift and acceptance manifested by some overt act. Beyond this, legally speaking, it does not appear that anything is absolutely necessary, for as to notice to the rajah and invitation to kinsmen, they are agreed not to be so, being merely intended to give greater notoriety to the thing, so as to obviate doubt regarding the right of succession, and even with regard to the sacrifice of fire, important as it may be deemed, in a spiritual point of view, it is so with regard to the brahmin, only; according to a constant distinction in the texts and glosses, upon matters of ritual observance, between those who keep consecrated and holy fire and those who do not keep such fires, *i. e.*, between brahmins and the other classes, it being by the

1868. November 23. S. A. No. 206 of 1868.

former only that the datta homam with holy texts from the Veda can properly be performed, as was held in the case of the Rajah of Nobkissen by the Supreme Court at Bengal. And even with regard to brahmins, admitting their conception in favor of its spiritual benefit, it by no means follows that it is essential to the efficacy of the right for civil purposes; but the contrary is to be inferred, and the conclusion is that its validity for these consists generally in the consent of the necessary parties, the adopter having at the time no male issue, and the child to be received being within the legal age, and not being either an only son or the eldest son of the giver, the prescribed ceremonies not being essential. Not that an unlawful adoption is to be maintained, but that a lawful one, actually made, is not to be set aside for any informality that may have attended its solemnization."

In support of this conclusion, Sir T. Strange refers not only to the *Digest* of *Jagannutha*, but to the opinions of Mr. Colebrooke and Mr. Ellis, which are collected in the 2nd volume and those opinions, though not all of them in terms quite consistent, seem to us, when considered together, fairly to warrant the conclusion.

At page 126 Mr. Colebrooke quotes the 3 *Digest* 244. "The inadvertent omission of an unessential part, as sacrifice is, even where it is enjoined, does not vitiate an adoption," and adds, "the adoption being complete, it cannot be annulled." Mr. Ellis says :—"Certainly, however defective the ceremony, and however small in consequence the spiritual benefit, the act of adoption cannot be set aside on any account whatever, a *fortiori* not on account of any informality." Further at p. 220 we find amongst the remarks of Mr Ellis upon the ritual of the datta homam extracted from the *Datta Mimansa* this statement.—" He concludes the result, with respect to practical use, to be that if the performance of the datta homam be established, the adoption is established; but if otherwise, that the converse does not hold good, and that further evidence may be adduced, ading that in no case can the omission of the ceremony affect an adoption in other respects valid; but that if not performed, when the adoption is from another gotram, it would seem from

1868. November 23. C. P. No. 206 of 1868.

analogy that the son, so adopted, must be Anitya Datta." The supposed distinction between the Nitiya and Anitya Datta is pointed out in the Pundit's answer at p. 121, and Mr. Ellis remarks thereon at p. 122 quoting a text from the *Nirnavasindhu;* and assuming it to exist for any practical purpose, it clearly affects only the status of the descendants of the adopted son, and not that of the adopted son himself. In the present case we do not know whether the adopted son was or was not of the same gotra, and it is unnecessary to follow further the analogy suggested by Mr. Ellis.

The opinion of Mr. Colebrooke at p. 155 that "The unintentional omission of some part of the ceremonies by the adopter would hardly invalidate the adoption, though the wilful omission of the whole by him might have that effect," appears by the context to have reference to an adoption intentionally incomplete and to the omission to perform the ceremony of tonsure and the like in the family of the adopter. The same remark applies to the observation of Mr. Colebrooke at pages 113 and 114. "The answer (of the Pundit) presumes the adoption to have been actually made, and the circumstances stated authorize the presumption. It would be otherwise if it were proved that the party had changed his intention before the essential rites of adoption took place and purposely avoided performing them." Mr. Ellis in his remark on the same case (p. 114), explains the sense in which he considers the datta homam to be necessary by saying, that "with brahmins it is indispensably requisite to produce spiritual benefit." It is, we think, in the same sense that the observation of Mr. Ellis at p. 131 must be understood, to render it consistent with the opinion expressed by him in other passages. In Mr. McNaghten's *Principles of Hindu Law* (Madras edition of 1865) at p. 69, it is said, "It is lastly requisite that the adopted son should be initiated in the name and family of the adopting party with the prescribed form and solemnities;" and in a note reference is made to the *Summary of Hindu Law*, p. 52d, and the *Elements of Hindu Law*, p. 82, for an enumeration of the ceremonies enjoined at adoption, adding, "but the exact observance of these ceremonies is not indispensable,"

1868. November 23. C. P. No. 206 of 1868.

for which *The Digest*, vol. 3. p. 324, and *The Elements of Hindu Law*, appendix pp. 101, 106, are cited.

Further, in the Judicial Committee of the Privy Council as long ago as 1834, the same view appears to have been recognized; for in 2 *Knapp* p. 290, we find Lord Wynford in delivering judgment in *Sootrungun Sutputty* v. *Sabitra Dye*, adverting to the fact that "neither written acknowledgments nor the performance of any religious ceremonial are essential to the validity of adoptions."

On the other hand, Mr. Justice Strange in his *Manual* expresses an opinion that the omission of the datta homam will invalidate an adoption made by the three higher castes; but he does not cite any authority in support of the position, and we are not aware of any other authorities at all equal in importance to the two treatises on adoption already mentioned.

Even Sir Francis McNaghten in his *Considerations*, where he has criticised so elaborately and severely the judgment of Sir T. Strange in *Veerapermal Pillay's* Case on many questions connected with the Hindu Law of adoption, has not explicitly stated his opinion that any particular ceremony is essential to the validity of an adoption. He refers (p. 119) to the statement of *Vachipati* that "Sudras are incompetent to affiliate a son from their incapacity to perform the sacrament of Homa and prayers prescribed for adoption," but he says that "this dictum is abundantly contradicted by Samiaca and others. And indeed the authorized practice of every day is a sufficient acknowledgment of the right and is in itself enough for the confutation of *Vachipati*." Further after quoting the text of *Vashista* at p. 126, he says, "the ceremonies to be performed at the time of adoption are there described, and some rules are laid down respecting the age, &c., of the boy to be adopted, but these rules do not equally apply to all the castes, and they may be said to be general only and not indispensably applicable to any one caste." Then he quotes a case of a Kritima adoption under the law prevalent in Mithila decided by the Sadr Adawlut in 1795 in which no

religious ceremony was observed, though (he says) "they ought according to legal strictness to have previously bathed." This was, he had been assured, a great relaxation of strictness in the doctrine which formerly prevailed by the authority of that school, but he suggests that the Courts in their efforts to get rid of superfluous forms, to remove mere ceremony out of the way of justice, ought to be consistent and guide themselves by the same liberal rules. With regard to the Rajah Nobkissen's case, Sir Francis, who was one of the Counsel for the adopted son mentions what it was considered necessary to prove in support of the adoption; and though the case was ultimately settled he says:—"I venture to say (and I am justified in saying so from what was declared by each Judge upon the bench) that Gopeemahen Deb was held bound to prove himself within the prescribed age, to prove that the initiatory ceremonies had not been performed in the family of his natural but in that of his adopting father and to prove not only 'a giving and receiving,' but that all the rites of adoption had been duly observed." The opinions of the Judges thus referred to could only have been given in the course of the hearing, and do not seem to have been quite satisfactory to Sir Francis himself, who in the next paragraph says that he should indeed have thought that the circumstances of that case might have exonerated the complainant from the proof of actual adoption and of its having been attended with all necessary formalities.

The authority of Sir Francis McNaghten cannot therefore, as it seems to us, be regarded as decidedly at variance with that of Sir Thomas Strange on the point which we have now to decide. Those two learned writers are decidedly at variance on the question whether there could be a valid adoption of an only son, but this Court in *Special Appeal* 412 *of* 1862 (1 *Madras High Court Reports* 54) and the Supreme Court of Bengal in *Sreemutty Jaurony Dossee* v. *Srimutty Sebasoondry Dossee* (*Fulton* 75) have upheld the opinion of Sir T. Strange on the ground that such an adoption, though blameable, when done is valid ; *factum valet.*

Further, we may refer to the judgment of this Court

1868. November 23. C. P. No. 206 of 1868.

in *Special Appeal* 38 *of* 1863 (1 *Madras High Court Reports* 368) in which it is incidentally observed that the customary rites and ceremonies connected with adoption would probably not be treated as necessary to its legal efficacy as regards the civil rights of the person adopted; and to the allusion made in the judgment of this Court in the Ramnad Case (vol. 2, page 234,) to "all essentials of a valid ceremony," but it is certain that on neither occasion did the Court intend to express any clear opinion, or in the last case any opinion at all, on the point now under consideration.

We were referred by Mr. Parthasarathy Ayangar to the late *Sadr Court Decisions of* 1852 at page 62, *Special Appeal* 74 *of* 1851, but that case only decides that a mere 'foster son' is not entitled to the privileges of an adopted son according to Hindu Law, and the passage quoted from *Nirnaya Sindhu* (of which we have been furnished with a translation) does not appear to us to add much weight to the authority of the *Datta Mimansa and Datta Chandrika.* The same text of *Vashista* already referred to is that on which the author relies; and so in the *Mitakshara* it is the text of *Vashista* which is quoted as the authority for the form of adoption, together with the more general passage from *Menu* :—" he is called a son given, whom his father or mother affectionately gives as a son, being alike (by class) and in a time of distress; confirming the gift with water." But these texts are in their language directory only, and the question is what part of the direction given is essential to the validity of the act ?

We have not had the advantage of hearing this case argued on both sides ; but, so far as we have been able to examine the authorities, the result in our judgment is that proof of the performance of the datta homam was not in this case essential to the establishment of a valid adoption, and that being the only ground of appeal, this special appeal must be dismissed and the judgment of the Lower Court affirmed.

Appellate Jurisdiction. (a)

Referred Case No. 35 *of* 1868.

GOPALA SETTY.......................................*Plaintiff.*

DAMODARA SETTY.................................*Defendant.*

Section 20 of the Limitation Act (XIV of 1859) is not applicable to a decree until the liability under it has become enforceable by process of execution.

THIS was a case referred for the opinion of the High Court by R. Vasudeva Row, the District Munsif of Manargudy, in Suit No. 298 of 1865. 1868. *December* 9. *R. C. No.* 35 *of* 1868.

From the case stated it appeared that an application was made on behalf of the plaintiff to the District Munsif's Court on the 12th October 1868 for execution of the decree made in Suit No. 298 of 1865 on the 17th of August 1865 on the Small Cause Court side of the District Munsif's Court. The suit was brought to recover the amount mentioned in a bond. A settlement was come to by the parties, and at their request, the District Munsif, sitting as a Small Cause Court Judge, gave judgment for the plaintiff, with a direction that the amount of the decree should be paid into Court on or before the 17th of October 1865. The application was made more than three years after the date of the decree, but within three years before the period at which it was obligatory upon the defendant to pay the amount into Court according to the terms of the decree.

The District Munsif, referring to the decisions of the High Court in Miscellaneous Special Appeal Nos. 8 and 70 of 1868, thought the claim of the plaintiff was barred by Section 20 of Act XIV of 1859, but reserved the question for the opinion of the High Court.

No Counsel were instructed.

This case coming on for hearing, the Court delivered the following

JUDGMENT :—We are of opinion that Section 20 of the Limitation Act (XIV of 1859) is not applicable to a decree until the liability under it has become enforceable by pro-

(a) Present: Scotland C. J, and Ellis, J.

1868. December 9. R. C. No. 35 of 1868.

cess of execution. The omission to take some proceeding to enforce the decree or to keep alive its force for three years constitutes the bar, and that necessarily implies that a liability under the decree was capable of being enforced by execution during that period. The observation in the judgment of this Court, to which the District Munsif has referred, was made with reference to a decree admitting of an application to enforce the liability under it from its date.

Our answer therefore to the question submitted is that the period of three years under Section 20 must be reckoned from the time when the decree became enforceable by process of execution, and consequently that the application for execution was not barred.

Appellate Jurisdiction (a)

Referred Case No. 36 of 1868.

VELLAYA PADYACHY.................. *Plaintiff.*

MOORTHY PADYACHY.................. *Defendant.*

Where an instrument purports to create an interest in immoveable property only as a collateral security for the payment of money, and is also a simple contract or bond for the payment of a debt, and where effect is sought to be given to the instrument only as a simple contract, it is admissible in evidence in a suit to recover the debt, though it has not been registered. So far as it is a contract for the payment of money, it is an instrument the registration of which is made optional by Section 18 of Act XX of 1866.

1868. December 11. R. C. No. 36 of 1868.

THIS was a case referred for the opinion of the High Court by F. H. Woodroffe, the Acting Judge of the Court of Small Causes at Cuddalore, in Suit No. 450 of 1868.

The suit was brought to recover rupees 57-9-8, being the balance of principal and interest payable under the following written instrument:—

" Mortgage bond executed by Moorthy Padyachy to " Vellaya Padyachy on the 19th June 1867 as follows :—

" On account of my necessity I have pledged to you the " whole of the punjah lands for which a puttah stands in my " name and received from you a bandy and two bullocks valued

(a) Present: Scotland, C. J. and Ellis, J.

1868. December 11. R. C. No. 36 of 1868.

"at rupees 100. As I have agreed to pay you this sum of "rupees 100 in ready cash, I shall pay you the same with "interest at 2 per cent. per mensem within 14th October "1867 in ready money. In default I agree to pay to you "the principal and profit at 25 per cent. on demand.

"Thus I have executed this mortgage bond with my "free-will and consent."

The defendant's vakil objected that the document, not having been registered, could not be received in evidence by virtue of Section 49 of the Indian Registration Act (XX of 1866), the document being one of the kind specified in Section 17 of the Act. The Judge held that the main intention of the parties was not the creation of a mortgage of defendant's land but to obtain payment of a sum of money, the land being considered as collateral security only, and the plaintiff in this suit sought to obtain a decree for money only. Treating the document as one of those specified in clause 7 of Section 18 of the Act, as to which registration was optional, the Judge received it in evidence.

The question put to the High Court was whether the document was admissible in evidence.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—The instrument sued on does undoubtedly purport to create an interest in immoveable property, but only as a collateral security. It is not thereby made the less available as a simple contract or bond for the payment of the principal debt, and, as such, it is one of those instruments the registration of which is made optional by Section 18 of Act XX of 1866. The provision in Section 49 relates only to Section 17, and was intended, we think, to prohibit any effect being given to an unregistered instrument for either of the purposes which make registration compulsory under Section 17. In this case the instrument is sought to be given effect to as a simple contract only. We are therefore of opinion that it has been rightly held to be admissible in evidence.

Original Jurisdiction (a)

Special Case No. 61.

VEMBAKUM SOMAYAGEE JANAKEE AMMAL, widow, executrix of and VEMBAKAM RUNGACHARRIAR. } *Plaintiff.*

P. MOONESAWMY CHETTY............................*Defendant.*

According to Hindu Law not only is the beneficial interest in the subject matter of the contract but the contract itself is assignable.

The assignee therefore may sue in his or her own name. This doctrine is applicable to suits brought in the Madras Small Cause Court.

1868. *December* 15. *S. C. No.* 61.

THE following case was stated for the opinion of the High Court by the Judges of the Madras Small Cause Court.

This was an action upon a promissory note brought by plaintiff, the widow and executrix of one of the two payees thereof against defendant, the maker of the note.

The following is a copy of the note:

Madras, 9th June 1865.

On demand I promise to pay to V. Rungacharry and Co. the sum of Rupees (600) six hundred at the rate of 12 per cent. per annum for value received.

(Signed) P. MOONESAWMY CHETTY.

Endorsed V. Rungacharry & Co.

It will be observed that the note is not negotiable.

The defendant pleaded.

(1) Not indebted, (2) Plaintiff has no right to sue, (3) Partial failure of consideration, (4) Plaintiff not executrix, (5) Note not stamped.

The real point put in issue and tried was that raised by the second plea.

The action was tried before the 1st Judge who non-suited the plaintiff upon the ground that she could not maintain the action as brought.

(a) Present: Scotland, C. J. and Bittleston, J.

The defendant subsequently moved the full Court for a rule *nisi* for a new trial, which was granted by the Court, the 1st Judge dissenting. The rule was subsequently made absolute by the Court, the 1st Judge dissenting, and thereupon by consent judgment was entered for the plaintiff contingent upon the opinion of the Honorable the Judges of the High Court upon a case to be stated to their Lordships.

The facts of the case are briefly as follows:—

The payees of the note were Venbakem Somayajee Rungacharyar and C. Vellary Naidu trading in co-partnership under the name of V. Rungacharry & Co.

In January 1868, Venbakam Somayajee Rungacharyar died.

Six or eight months before his death the partnership had been dissolved and a settlement of their partnership affairs come to between the partners.

The note, the subject of this action, formed portion of the partnership assets, and as such, by an arrangement between the partners, fell to the share of Venbakem Somayajee Rungacharyar, and was treated in the settlement of the partnership accounts as so much cash paid to him.

The note thus became part of the private estate of Venbakem Somayajee Rungacharyar, and as such came into the hands of his widow and executrix.

The other of the partners, C. Vellary Naidu, is still alive. He disclaims all beneficial interest in the note, and affirms the plaintiff's right thereto in virtue of the transaction between the partners already stated.

The note was not endorsed during partnership or on its transfer to Venbakem Somayajee Rungacharyar, but only after action brought by C. Vellary Naidu, who wrote upon it the partnership name.

Some stress was laid by the plaintiff's attorney upon the fact that Sreenevassa Iyengar, the plaintiff's brother, had, subsequently to Venbakem Somayajee Rungacharyar's death, demanded payment of the note from the defendant, who in answer thereto said that he would pay by and bye. The 1st Judge, however, allowed no weight to this evidence,

1868. December 15. S. C. No. 61.

because, in the first place, it may be construed as a promise to pay the person lawfully entitled to payment, and not necessarily the plaintiff, and in the second place even though it could be so construed, it could not aid the present action, though it might be a ground for a new action upon the new promise.

The 1st Judge, in disposing of the case, proceeded upon the assumption that the transaction between the partners, already referred to, was a *boná fide* and valid equitable assignment of all interest in the note to Venbakem Somayajee Rungacharyar, the plaintiff's testator.

The 1st Judge, however, dismissed the action upon the well established principle of law that *choses in action* are not assignable except in certain well known instances, and held that the note in question not being negotiable, nothing that the payees of it could do would vest in an assignee of it a right of action upon it at law, and that even if the Court had been a Court of Equity, instead of a Court of Law, the plaintiff's suit would not have been maintainable except it appeared that the surviving partner had refused to allow her to sue in his name or otherwise obstructed her remedy at law.

It was urged upon the Court that, assuming the English Law to be adverse to the plaintiff's right of action as brought by her, the Hindu Law was in this respect different from the English Law and was moreover binding upon this Court.

For this position there was no authority whatever cited to the Court except indeed the *obiter dictum* of the High Court in case of *Kristna Chetty* v. *Balarama Chetty* (1 High Court Reports, page 137), can be construed into an expression of opinion by the learned Judges who pronounced the judgment therein, to the effect that a *chose in action* is assignable, and as such an authority in point.

The majority of the Court, differing from the 1st Judge, considered the above case an authority in point; and also held that the assignment of the note to Venbakem Somayajee Rungacharyar was a valid assignment, and as such by Hindu Law vested in the assignee all right, and title, interest in the note, including the right to sue upon it in her own name.

1868. December 15. S. C. No. 61.

The question, which we beg to submit for your Lordships' opinion is, whether, under the circumstances stated, the plaintiff was entitled to maintain an action in her own name upon the note?

No Counsel were instructed.

The opinion of the High Court was as follows:—

In the High Court, Appellate Side, it has been distinctly held (1 Madras H. C. Reports 150,) that according to Hindu Law a contract is assignable, and that the assignee may sue in his own name, and the only question is whether that decision is applicable to suits in the Small Cause Court. It is not disputed that in an action ex-contractu between Hindus in the Small Cause Court, that Court is bound to apply the Hindu Law of contracts; and we think that as by that law not only the beneficial interest in the subject matter of a contract, but also the contract itself is transferable, the complete remedy upon the contract must be recognised as vested in an assignee. The rule of the English common law, which enables the assignee of a *chose in action* to bring a suit but requires him to make use of the name of the assignor, rests on the ground that the benefit of the contract is assignable, but not the contract itself. A contrary opinion to this could only be supported on the ground that the question is one of procedure merely, and that consequently the English common law rule must govern. Now in the books a considerable conflict of authority is found on the point whether the inquiry in whose name the suit is to be brought, in that of the assignor or in that of the assignee, belongs to the right and merit of the claim or to the form of the remedy—that is, whether it is to be answered with reference to the *lex domicilii* of the obligee or to the *lex fori*, but we think that the tendency of the later decisions is in favor of the view which we have taken—(See the observations of Mr. Justice Story and the cases cited in the Conflict of Laws, Sections 565, 566; also Phillimore's International Law, Vol. 4, Section 760; and *Vanquelin* v. *Bonard*, 33 L. J. C.P. 78.) We therefore answer the question submitted to us in the affirmative.

Appellate Jurisdiction (a)

Miscellaneous Regular Appeal No. 105 of 1868.

BANDAM SETTAH and another.........*Petitioners.*

BANDAM MAHA LAKSHMY.............. *Counter Petitioner.*

A daughter-in-law is not the heiress of her mother-in-law according to Hindu Law.

An application by a daughter-in-law under Act XXVII of 1860 for a certificate as heiress would be properly rejected upon the sole ground that the applicant was not the heiress.

If a Civil Court is proceeding under Section 8 of Act XXVII of 1860 to grant or has granted a certificate authorizing a person to deal with Government Securities which are claimed by a third person as his property, that is a ground on which such third person may come into Court to oppose the grant of a certificate or to seek for its cancelment.

1868. *December* 18. *M. R. A. No.* 105 *of* 1868.

THIS was a petition against an order of E. B. Foord, the Civil Judge of Berhampore, dated the 11th February 1868.

In this case two classes of petitioners presented petitions to the Civil Court of Berhampore asking for certificates under Act XXVII of 1860.

In extra petition No. 2 of 1868, the petitioner, Bandam Maha Lakshmy, stated that she had appointed Subammah, her mother-in-law, trustee of an " Una Chuttrum" established at Ganjam, and entrusted to her a Government promissory note for rupees 15,000 to enable her to apply the interest to the management of the charity; and that Subammah died on the 6th December 1866. Petitioner prayed that a certificate might be granted to her to enable her to collect a sum of rupees 69-6-0 due for interest on the promissory note, and also a sum of rupees 639 deposited in the Collector's Treasury on account of the half-yearly interest, both sums to be expended upon the charity.

In extra petitions Nos. 66 and 67 of 1868, Bandam Settah and Bandam Venkata Lakshmy, who were also daughters-in-law of Subammah, stated that Subammah sold the Government promissory note for rupees 15,000 to them for rupees 3,000 on the 5th December 1866 and executed a registered deed of sale in their favor, and that they per-

(a) Present: Collett, and Ellis, JJ.

formed the funeral rites of Subammah and became her legal heirs. They also asked for a certificate to enable them to obtain payment of the interest due on the promissory note.

The Civil Judge made an order directing that a certificate should be granted in favor of Bandam Maha Lakshmy as trustee for the property, as the petitioner appeared to be the legal heiress of Subammah, and he observed that the claims set up by the petitioners in Nos. 66 and 67 of 1868 could only be properly decided by a regular suit, it being impossible to do so in a summary enquiry such as was contemplated by the Act.

Bandam Settah and Venkatah Lakshmy appealed to the High Court against the order of the Civil Judge upon the following grounds:—

I. That Maha Lakshmy was not the heiress of Subammah.

II. That the Judge was only authorized to grant a certificate of property which belonged to Subammah at her death and was bound to inquire into the sale to the petitioners.

III. That the Judge ought to have granted a certificate to the petitioners.

At the first hearing, the Civil Judge was directed to take evidence upon the sale of the promissory notes set up by the petitioners. The evidence taken showed that the legal ownership of the note was vested in Subammah, and that it was, shortly before her death, transferred to the appellants.

Mayne, for the petitioners.

Snell, for the counter-petitioner.

The Court delivered the following

JUDGMENT:—We are of opinion that the certificate under Act XXVII of 1860 granted to the respondent Maha Lakshmy by the Civil Court, authorizing her to receive the dividends on the Government promissory Note, No. 16,013, for Rupees 15,000 as the heir of the deceased Subbamma, ought to be cancelled.

It is quite clear that the parties cannot be allowed to turn this application into a suit for the decision of their

1868. December 18. M. R. A. No. 105 of 1868.

respective claims to the above promissory note. The right to a certificate must depend upon the fact of heirship to Subbamma. Now it is obvious that Maha Lakshmy, a daughter-in-law, could not be the heiress of her mother-in-law, Subbamma, and the Civil Court would have acted very properly if on this ground it had at once rejected her application for a certificate. But the Civil Court having granted the certificate, and the appellants holding exactly the same relationship to Subbamma as respondent, and being consequently equally not heiresses of Subbamma, we should not have interfered on appeal if the appellants had no other ground but relationship on which to rest their claim to be heard. But we can have no doubt that if a Civil Court, under Section 8 of Act XXVII of 1860, is proceeding to grant, or has granted, a certificate, authorizing a person to deal with Government Securities which are claimed by a third party as his property, that is a good ground on which such third party may come into Court to oppose the grant of a certificate, or to seek its cancelment. The appellants in this case set up a title to the Government promissory note in question under a transfer to them by Subbamma in her life-time, and therefore the Civil Court has been required to take evidence on the matter. It is clear that the legal ownership of the note was transferred to and vested in Subbamma, and the evidence that it was just before her death transferred by her to appellants was not questioned nor discussed before us by the Counsel for respondent. It is *primâ facie* satisfactory evidence and we think that, without deciding in the least whether the transfer to Subbamma was subject to any trust in favor of any charity, or any person, or whether the transfer by her to appellants was made under such circumstances as will enable any person having an interest in the note hereafter to set aside the transfer, there is made out such a *primâ facie* case for appellants as to cancel the certificate granted to the respondent, the more especally as on the ground of heirship the respondent was not at all entitled to a certificate.

Appellate Jurisdiction (a)

Referred Case No. 37 *of* 1868.

SINTHAYEE, widow of SANKARA UDAYAN (deceased), against THANAKAPUDAYEN *alias* PONDILY UDAYAN and another.

Arrears of maintenance can be recovered by process of execution in a suit in which a decree is passed providing for the payment of future maintenance. Where arrears of maintenance can be recovered by such process of execution they cannot be made the subject of a fresh suit.

THIS was a case referred for the opinion of the High Court by A. Annasamy Mudali, the Acting Principal Sadr Amin of Tanjore, in Suit No. 414 of 1868. 1868. *December* 21. *R. C. No.* 37 *of* 1868.

The plaintiff, a Hindu widow, brought the present suit to recover Rupees 78-10-8 due for arrears of maintenance from January 1866 to September 1868 at 15 callums of paddy and Rupees 7 in cash per annum. She alleged that her right to maintenance at the above rate had been allowed by the decree of the Additional Munsif of Tanjore in Original Suit No. 210 of 1865. The decree awarded to the plaintiff annual maintenance at a fixed rate. It had hitherto been held that such decrees might be executed annually on the failure of the judgment debtor to pay the amount or perform any other act mentioned in the decree; but the plaintiff put in a copy of an order, dated the 26th July 1868, made by the late Civil Judge of Tanjore, Mr. E. W. Bird, in which the Civil Judge held that a similar decree could not be executed every year. The Civil Judge was of opinion, having reference to the recent Stamp Act, the Civil Procedure Code, and the Rules for the guidance of District Munsifs as Judges of Small Cause Courts, that a suit for future maintenance could not be regarded otherwise than as declaratory decrees incapable of execution, but which might afford a good ground for a separate suit.

The question put by the Principal Sadr Amin was as follows :—

Does the constantly recurring cause of action, which

(a) Present: Bittleston and Ellis, JJ.

1868. December 21. R. C. No. 37 of 1868.

the failure to pay maintenance every year discloses form the subject of fresh suits in the face of a decree granting relief for a whole life ?

He intimated his own opinion that a fresh suit could not be maintained.

No Counsel were instructed.

The Court delivered the following

JUDGMENT.—The practice of all the Indian Courts has been for very many years to make decrees for payment of future maintenance to Hindu widows, either by directing the periodical payment of a fixed sum or by setting apart a portion of the property and assigning the interest or proceeds thereof to the widow for her maintenance. One instance is afforded in the case reported at page 36 of the 2nd Volume of *Madras H. C. Reports* (S. A. 433 of 1863), where this Court approved of the decree of the Principal Sadr Amin ordering future maintenance at 3 Rupees a month from the date of the plaint, and observed that "there is no authority for saying that a woman entitled to maintenance must, to obtain the sum to which she is entitled, bring annual actions." That observation was no doubt made with reference to the question raised in that suit whether the plaintiff could recover arrears of maintenance ; but if it be true that the Courts have authority to decree payment of a fixed sum per month for maintenance it follows that such decrees must be capable of execution, in the same way as decrees for payments of money by instalments may be executed. (See Civil Procedure Code, Section 194, and Referred Case 25 of 1863, *Madras High Court Reports*, Volume 1, page 459).

There is nothing which we can discover in the Stamp Act of 1867, or in the Civil Procedure Code, to prevent the execution of such a decree, and if the arrears of maintenance can be recovered by process of execution in the suit in which the decree was passed, then they must be so recovered, and cannot be made the subject of a fresh suit (Section 11 of Act XXIII of 1861).

A question might arise as to the jurisdiction of a Small Cause Court to pass any such decree on account of the limit

as to amount prescribed for Small Cause Courts, but, in the particular case under reference, no objection on that ground has been or can now be taken; and it is unnecessary therefore to consider that point. 1868. *December* 21. *R. C. No.* 37 *of* 1868.

Another objection which may be suggested is that such decrees, providing for the payment of maintenance for a future indefinite period, could not be enforced if, at a subsequent period, the widow by misconduct should forfeit her right to maintenance, but this objection has never been considered sufficient to prevent the passing of such decrees, and probably in a case of proved misconduct, sufficient to destroy the right, the Court which passed the decree would be as much at liberty to entertain that objection in answer to any application for execution in the same suit as the same Court or another Court would be at liberty to entertain it in a fresh suit.

Appellate Jurisdiction (a)

Criminal Regular Appeal No. 166 *of* 1868.

A. VEDAMUTTU ....*Appellant (Prisoner).*

A Hindu, who has become a convert to Christianity, is not under a legal obligation to speak the truth, unless his evidence be given under the sanction of an oath on the Holy Gospels, so as to justify a conviction under Section 193 of the Indian Penal Code.

A statement made by a witness in a criminal trial not upon oath or solemn affirmation is not a declaration within the meaning of Section 199 of the Penal Code, nor is the witness bound to make a declaration under Section 191.

THIS was an appeal against the sentence of J. C. Hannyngton, the Acting Session Judge of Calicut, in Case No. 84 of the Calendar for 1868. 1868. *December* 21. *C. R. A. No.* 166 *of* 1868.

The prisoner was charged with having, on the 4th of August 1868, being then a witness in Calendar Case No. 13 of 1868, which was a judicial proceeding then pending before the Assistant Magistrate of Malabar, and being bound by solemn affirmation to state the truth, intentionally given false evidence, by knowingly and falsely stating that he on the previous Monday week in company with one Karichen

(a) Present: Scotland, C. J. and Ellis, J.

1868. December 21. C. R. A. No. 166 of 1868.

went to Izad amsham, having left Calicut at ½ past 5 that morning and reached Izad at half past 5 on the same evening, whereas he did not proceed to Izad, but remained at Calicut during the greater part of that day, and that he had thereby committed an offence punishable under Section 193 of the Indian Penal Code.

The prisoner was also charged under Section 199 with having made the above statement as a declaration in Calendar Case No. 13 of 1868 then pending before the Assistant Magistrate of Malabar, which declaration the Assistant Magistrate was authorised to receive as evidence of a fact material to the issue of that case.

The defence, apart from that founded upon the facts, was that the prisoner was not legally bound to speak the truth, that the prisoner was a Christian, and his deposition before the Assistant Magistrate was given upon solemn affirmation, whereas it ought to have been taken on oath. It was established that the prisoner was a Christian, and that his deposition was taken on solemn affirmation.

The Session Judge held that there was a legal obligation to speak the truth within Section 193, and that there was a declaration within the meaning of Section 199 of the Penal Code, and the prisoner was convicted and sentenced to twenty-four hours' simple imprisonment, and to pay a fine of rupees 200, and in default one month's further simple imprisonment.

The prisoner appealed to the High Court against the conviction.

Gover for the appellant.

The Court delivered the following

JUDGMENT:—The prisoner in this case has been convicted on two charges under Sections 193 and 199 of the Penal Code, the charge of giving false evidence in a judicial proceeding being bound by solemn affirmation to state the truth, and that of making a false statement in a declaration before a Magistrate which he was authorised to receive as evidence of a fact material to the case then pending. Both charges relate to the same statement of the prisoner made when he was under examination before the Assistant Magis-

trate of Malabar as a witness in a criminal case, and taken down at the time in the form of a deposition. There is no doubt that the statement was wilfully false, but the prisoner had become a convert to the Christian faith, and the usual oath appears not to have been administered to him before he was examined ; he had simply made the affirmation required by Act V of 1840. The omission of the oath is now urged by the prisoner's Counsel as a fatal objection to the conviction, and we are of opinion that it is.

1868.
December 21.
C. R. A. No. 166 *of* 1868.

It was essential to the first charge to prove that the prisoner, at the time he made the false statement, was under a legal obligation as a witness to state the truth, and to constitute that obligation in the case of a witness in a judicial proceeding who professes the Christian faith, the sanction of an oath on the Holy Gospels is an absolute requirement of the law. Act V of 1840, which gives to the affirmation made by the prisoner the same legal effect as an oath, applies only to persons who are Hindus and Mahomedans by religion as well as by birth. The prisoner therefore has not, we think, been guilty of the offence alleged in the first charge.

In regard to the second charge, the question is whether the false statement can be held to be a statement made in a declaration within the meaning of the Section (199) on which the charge is framed. We are of opinion that it was intended by the Section to make the penalty attached to the offence of giving false evidence applicable to declarations which, although not compellable, have, on being made, the same effect as the compulsory declarations referred to in Sections 51 and 191, and that "declaration" in the Section means any statement of fact in the form simply of a declaration, which, for the purpose of proof of the fact declared to, has by itself all the legal force of evidence given on oath or the solemn affirmation substituted for an oath : in short a declaration receivable in lieu of personal testimony. Here the statement is a part of the prisoner's deposition as a witness, and as such, not having been made under the sanction of an oath, it is not receivable as legal evidence of the fact stated. Further, the provision in the Section making it essential to prove the materiality of the

1868. December 21. C. R. A. No. 166 of 1868. false statement, (which is not necessary under Section 193 (*The Queen* v. *Aidrus Sahib*, 1 *Mad. H. C. Rep.* 38,) and declaring the offence punishable in the same manner as if the offender "gave false evidence," shows clearly, we think, that the Section has no reference to the examination of a witness in a judicial proceeding. On the second charge therefore the conviction is not sustainable.

But it is necessary to decide the further question, whether, when the prisoner made the false statement, he was under a legal obligation to *make a declaration* within the meaning of Section 191, for, if so, we should be bound to uphold the sentence under Section 426 of the Criminal Procedure Code, although that offence has not been charged. We are of opinion that the prisoner was not at the time under such an obligation, for the same reason as that on which we have held the first charge invalid. His statements were made in the character of an ordinary witness, and were so taken down, and as a witness he was not by law bound or at liberty to make any declaration or statement touching the matter under enquiry except on oath.

The result is that the conviction and sentence must be annulled, and the fine, if paid, returned to the prisoner.

Appellate Jurisdiction (a).

Civil Miscellaneous Regular Appeal No. 183 *of* 1868.

NA'RA'YANASAMY NAIKAR............*Petitioner*.

VE'LU PILLAY..........................*Counter-Petitioner*.

The Civil Court has no jurisdiction under Section 29 of Regulation IV of 1816 to make an order for the execution of a decree in a suit tried before a Village Munsif. The Section only applies where a Village Munsif has been guilty of corruption or partiality in the decision of a cause tried by him.

1869. January 4. C. M. R. A. No. 183 of 1868. THIS was a petition against an order of F. S. Child, the Civil Judge of Tinnevelly, dated the 3rd April 1868.

The appellant in this case was the defendant in a suit before the Village Munsif of Thurgungycolam, in the

(a) Present; Scotland, C. J., and Ellis, J.

district of Tinnevelly. The counter-petitioner Vélu Pillai was the plaintiff in the suit, which was tried before the Village Munsif under Regulation IV of 1816, in which a decree was passed in favor of the plaintiff. The counter-petitioner Vélu Pillai alleged that he had not obtained satisfaction of the decree in consequence of the misconduct of the Village Munsif, and he presented a petition to the Civil Judge of Tinnevelly praying to have the decree executed. A petition was alleged to have been sent by Vélu Pillai to the Village Munsif asking him to withdraw the execution of the decree on the ground that he had received the amount of the decree from the defendant in the suit; but Vélu Pillai denied that the document was a genuine one.

1869. *January* 4. *C. M. R. A. No.* 183 *of* 1868.

By an order dated the 3rd April 1868, the Civil Judge directed that the petitioner had a right to have his decree executed, and, holding that the petition said to have been given by Vélu Pillai to the Village Munsif was a forgery, the Civil Judge annulled it under Section 24, Regulation IV of 1816.

The appellant appealed to the High Court under Section 35 of Act XXIII of 1861 upon the ground that the Civil Judge had no jurisdiction to make the order.

O'Sullivan for the petitioner.

Rama Ráo for *Srinivasa Chariyar* for the counter-petitioner.

The Court delivered the following

JUDGMENT :—This case is not within the Code of Civil Procedure, and Section 29 of Regulation IV of 1816 did not empower the Civil Court to make the order in question. That Section applies only when a Village Munsif has been guilty of corruption or partiality in the decision of a case. Here the decree is not objected to, but it is alleged that a fraud has been practised by which the execution of it is prevented. The order of the Civil Court must therefore be set aside under Section 35 of Act XXIII of 1861.

The plaintiff will be quite at liberty to apply again to the Village Munsif giving all the evidence that he can to

1869. January 4. C. M. R. A. No. 183 of 1868.

support the charge of fraud, and, should he refuse to take the proper proceeding to enforce the decree, the plaintiff may, if so advised, seek redress by taking criminal proceedings against him or the defendant or both.

It is accordingly ordered that the order of the Civil Court, dated the 3rd April 1868, be, and the same hereby is, set aside as having been passed without jurisdiction.

Appellate Jurisdiction (a)

Special Appeal No. 311 of 1868.

TOTAKOT SHANGUNNI MENON the Dewan of Cochin.................. *Special Appellant.*

KURUSINGAL KAKU VARID and another........................ *Special Respondents.*

A suit may be maintained against a surety according to Hindu Law although the principal debtor has not been sued.

1869. January 4. S. A. No. 311 of 1868.

THIS was a Special Appeal against the decree of G. R. Sharpe, the Civil Judge of Calicut, in Regular Appeal No. 428 of 1867, modifying the decree of the Court of the Principal Sadr Amin of Calicut in Original Suit No. 46 of 1865.

This was a suit to recover from the defendants as the sureties of one Punakel Parunji Kunhappa the sum of rupees 5,887-15-5 with interest.

The plaint set forth that the abkarry farm of the Cochin Circar was taken at an auction by Punakel Parunji Kunhappa on his agreeing to manage it for one year from the 1st Chingam 1040 to the 31st Karkedagam last, and to pay rupees 610 per mensem by two instalments ; that accordingly on the strength of two kachits executed by the 1st and 2nd defendants on the 29th and 30th of Karkidagam 1039 agreeing as sureties to pay the amount on the failure of Kunhappa to do so, the purchase of the farm was confirmed to him ; that accordingly Kunhappa managed the farm for a year from the said Chingam to Karridagam and surrendered the farm, leaving a balance on that account

(a) Present : Scotland, C. J, and Ellis, J.

of rupees 5887-15-5. The defendants alleged that according to the contract the farm ought to have been taken from the contractor on his failure to pay one monthly instalment, but this course was not followed but delayed for 12 months; and that as the contractor was not made a party, the suit could not be maintained.

The Principal Sadr Amin gave the plaintiff a decree for the amount sued for.

In Appeal the Civil Judge modified the decree, holding that defendants were only liable to pay one month's rent upon the true construction of the contract.

The following extract is taken from the Judgment of the Civil Judge :—

" I entertain considerable doubts as to the regularity of this plaint (which does not include the principal) being brought against these defendants who are undoubtedly collateral sureties for the same debt, but are so under separate agreements executed on different dates.

" I entertain still stronger doubts whether these defendants are not entitled to what the Romans called *beneficium ordinis i. e.*, whether the plaintiff was not bound to have sued the principal debtor before the sureties. The rule of the Hindu Law is, that the principal must, in all cases, be first sued (*I Strange's Hindu Law* 301) and the same rule having been laid down by Justinian in one of his novels (*Novs. 4 C.* 1 *ut creditores primo loco conveniant principalem)* has been adopted in most countries deriving their jurisprudence from the Civil Law. (France, Holland, Scotland, &c.) Further upon this point no mean authority (Mr. Chancellor Kent) remarks " a rule of such general adoption shews that there is nothing in it inconsistent with the relative rights and duties of principal and sureties, and that it accords with a common sense of justice and the natural equity of mankind." I think, therefore, that were it necessary to decide the point, I should adopt the above rule in all cases, and more especially I should not decree against the sureties upon a plaint like this which offers no explanation whatever of why the principal is not proceeded against.

1869. January 4. S. A. No. 311 of 1868.

"The chief question, however, for determination is the construction of the agreements entered into by these defendants, and upon that question I am quite unable to concur with the Principal Sadr Amin in adopting the interpretation put upon them by plaintiff.

"The pleadings in the case are somewhat loose and the issues recorded are looser still, nor, without further consideration, should I be prepared to concur with the Principal Sadr Amin of Calicut in his view of the *onus probandi*. To avoid, however, further litigation and annoyance, the defendants at my suggestion consented to a decree for one month's instalment and proportionate costs being passed against them, of course without any prejudice to their contentions should a higher Court adopt a different view of the contract and the whole case be re-opened. Unable to see how plaintiff can claim any higher sum, I accordingly decree, in modification of the decree of the Court below, that defendants do pay to plaintiff rupees 610 with interest thereon at 12 per cent. from date of plaint to date of this decree."

The plaintiff preferred a special appeal to the High Court against the decree of the Civil Judge, on the ground that the Civil Court had misconstrued the meaning of the instruments on which the claim was founded.

The Advocate General, for the special appellant, the plaintiff.

G. E. Branson, for the special respondents, the first and second defendants.

The Court delivered the following

JUDGMENT:—This is a suit against two sureties in an abkary contract to recover rupees 5,887-15-5, being the amount of several instalments which the principal had failed to pay at the termination of the contract, together with interest. The original Court decreed the liability of the defendants for the full amount claimed. But the Civil Court, differing on the construction of the contract, has held the amount of one instalment with interest to be the most that is recoverable and accordingly modified the decree of the original Court, the defendants consenting to pay that

amount. It seems probable too from the judgment of the Civil Judge that, but for such consent, he would have decreed the dismissal of the suit on the ground that a suit against sureties is not maintainable until after the principal has been proceeded against. 1869. *January* 4. *S. A. No.* 311 *of* 1868.

From the decree of the Civil Court the plaintiff has appealed, and the objection on his part is that the contract has been misconstrued. On the other hand, it is contended for the respondents that the Civil Judge's view of the law in regard to their non-liability to be sued before the principal debtor is sound.

With respect to the appellant's objection, the question is whether the terms of the written contract import a general guarantee by the defendants of the payment of the monthly instalment by the principal during the term of the contract, or (as the Civil Judge has held) the limited undertaking to make good the amount of one month's instalment and of any loss that might be sustained on the re-letting of the farm for default in payment of an instalment. [Upon the construction of the contract the High Court held that the defendants had made themselves responsible for the amount due at the termination of the contract.]

Next as to the objection that the suit did not lie until after the principal debtor had been sued. The single authority for the position laid down in *Sir Thomas Strange's Treatise*, on which the Civil Judge has relied, appears to be the texts of *Vrihaspati* with the commentary of *Jagannadà* in *Colebrooke's Digest Bk.* 1, *Ch.* 4, *Section* 2, *clause* 148 :— Let the creditor allow time for the surety to search for the debtor who has absconded, a fortnight, a month, or six weeks, according to the distance of the place where he may be supposed to lurk.

" Let no sureties be excessively harassed, let them gradually be compelled to pay the debt, let them not be attacked if the debtor be at hand and amenable : such is the law in favor of sureties."

The first of these injunctions evidently relates to suretyship for the appearance of a debtor which is according to

1869. January 4. S. A No. 311 of 1868.

Vrahaspati one of the four kinds of legal surety-ship, and renders the sureties liable on failure of their engagement to pay the debt (*See the same Chapter of Colebrooke's Digest Clause* 142); and it seems questionable whether the other injunctions have reference to any other kind of suretyship. At all events they do not, we think, imply the rule of law now contended for. The injunction " let them not be attacked if the debtor be at hand and amenable" alone imports that the principal should be proceeded against, and that, if a prohibition at all, amounts to an absolute prohibition of the liability of sureties when the debtor is at hand and amenable which is certainly not a benefit available to the present defendants. The terms in which the injunctions not to harass excessively and to compel payment gradually are expressed are too vague to admit of any definite construction. We are unable therefore to consider these texts as authority for the position that sureties cannot be proceeded against before the principal debtor has been separately sued, and all the other texts set forth in the same chapter of the *Digest* relating to the liability of sureties declare generally that sureties for payment by their principal are liable on his default.

The Hindu Law then being, in our view, not opposed to the rule of the English Law by which either the principal on the surety may be sued at the election of the party with whom they have contracted, is there any other ground on which its application to this and similar cases can be considered unjust ? The principle of the rule is that the contract imposes on the surety the obligation to see to payment or performance on the part of the principal, and this is no more than the just effect of a contract of surety-ship, such as the one in question. When the contract is silent in regard to a suit against the principal, suing the surety is but seeking to enforce the liability incurred by the undertaking of the latter. It is true that eventual indemnity from loss is the substantial object of the collateral contract of a surety; and therefore in accordance with perfect equity that the defaulting principal should be sued, but only when he is shewn to have the means of meeting his liability, and this appears to have been the extent of the benefit secured to the creditor by the *beneficium*

1869. January 4. S. A. No. 311 of 1868.

ordinis or *excussionis* introduced into the Roman Law by the *Novellae Constitutiones of Justinian, Nov. 4 Ch. 1*. The surety was liable to be first sued, and the action being *stricti juris*, it was for him to plead the *exceptio ordinis*, otherwise the suit proceeded to judgment, and he could not successfully plead it when it appeared that the plaintiff would be prejudiced or that the suit against the principal would be ineffectual, for then *iniquum est eum condemnari* could not be declared. The effect of the law is concisely stated in *Colquhoun's Roman Civil Law, Vol. 2, Sec.* 1610.

The justice of such a rule of procedure lies in the sureties being secured the right to insist on the payment by the debtor in their discharge to the extent of his means. Now there is no doubt that in practice when the principal debtor is not sued, it is, at all events in the majority of instances, because he has no property available to meet his liability. It is most probably so in the present case. The positive general rule contended for would therefore not only be without the principle of equity in favor of sureties to support it, but would also subject creditors inequitably to the expense and delay of useless suits. Further in any case of the omission to sue a principal who possesses the means of paying, the Code of Civil Procedure supplies the surety with a remedy. He can, when sued, compel the creditor to obtain a decree against the principal debtor according to the justice of the case, by having him made a party to the suit under Section 73, and this remedy, we think, secures all just and reasonable protection consistent with the several rights and liabilities under the contract.

For these reasons we are of opinion that the rule of English law should govern our decision, and consequently that the respondent's objection is untenable. The result is that the decree of the Civil Court must be reversed, and the decree of the original Court affirmed. The plaintiff's costs in this and the Civil Court must be paid by the defendants.

Appellate Jurisdiction. (a)

Special Appeal No. 238 *of* 1868.

SUBBU HEGADI..................................*Appellant.*

TONGU..*Respondent.*

A female who is a member of a family governed by the Aliyasantana system of law living apart from the family with her husband is not entitled to a separate allowance for maintenance out of the income of the family property.

Semble.—The husband is bound to maintain his wife out of his self-acquired means so long as she continues to live with him.

1869. *January* 4. *S. A. No.* 238 *of* 1868.

THIS was a Special Appeal against the decree of J. C. St. Clair, the Acting Civil Judge of Mangalore, in Regular Appeal No. 534 of 1866, modifying the decree of the Court of the Principal Sadr Amin of Mangalore in Original Suit No. 10 of 1864.

The plaintiff sued on behalf of herself, her children and grandchildren, for maintenance, secured on family property producing annually rupees 1,434-12-0, with a house and furniture, amounting altogether in value to rupees 1,599-14-8.

The defendants 1, 2, and 3 denied the relationship alleged in the plaint, and stated that the plaintiff was a woman under coverture, and as such entitled to no maintenance during the life of her husband who was bound to provide for her according to the usage obtaining in Canara.

Three issues were settled as follows :—

I. Whether the plaintiff has a right of action.

II. Whether her alleged relationship is true.

III. If so, whether the usage pleaded is good in law.

The Principal Sadr Amin found in favor of the plaintiff upon the 1st and 2nd issues. Upon the third issue his finding was as follows :—

"In regard to the third question, that Aliyasantana women live with their husbands, and are not visited by them at their family mansions as in Malabar, are facts recognized in the appeal decree 82 of 1843. Nor is there

(a) Present : Scotland, and Ellis, J.

any contention about the fact, the question at issue being who is bound to maintain her, whether the husband or the family. Marriage under the Aliyasantana rules is barely a contract between man and woman to co-habit with each other, and certainly not an institution that fixes the status of persons to which alone civil rights can attach themselves. To hold that Aliyasantana men are to maintain their wives from their family funds, is a direct violation of the rule of Bhutal Pandiya.—' That the husband is not to be permitted to confer upon his wife any gifts but the marriage present, if he give one pice more, the family may resume it.' The usage cannot therefore be held to bar the right of a woman to seek for maintenance from her family, and to return to it, whether she is a virgin or a widow or under coverture."

The decree was that the defendants should pay the plaintiff rupees seven a month with the arrears sued for at the same rate and provide her with a house and furniture as mentioned in the plaint or pay their value, and that the rest of the claim be dismissed, and that costs be assessed proportionately ; and that in the event of defendants committing default in paying the maintenance decreed, land producing 84 rupees a year be placed in her possession.

Upon appeal, the Civil Judge reduced the annual allowance to rupees 24 with arrears for 4 years at the same rate and disallowed the house, furniture, cattle, ploughing implements, &c., awarded to plaintiff by the Principal Sadr Amin.

The Civil Judge's Judgment contained the following remarks:—

" With regard to the 3rd point, namely, whether a woman living under the protection of her husband can claim maintenance from her own family under the Aliyasantana law, I have considerable doubts as to the correctness of the decision arrived at by the Principal Sadr Amin, and I cannot agree with him that a husband is not bound to support his wife or children. The Principal Sadr Amin states that ' marriage under the Aliyasantana rules is barely a contract between man and woman to cohabit with

1869. January 4. S. A. No. 238 of 1868.

each other, and certainly not an institution that fixes the status of persons to which alone civil rights can attach themselves. To hold that Aliyasantana men are to maintain their wives from family funds is a direct violation of the rule of Butal Pandiya that the husband is not to be permitted to confer upon his wife any gifts but the marriage present; if he give one pice more, the family may resume it. The usage (of women living with her husband's family) cannot therefore be held to bar the right of a woman to seek for maintenance from her family, and to return to it, whether she is a virgin, widow, or under coverture.'

"The extract quoted by the Principal Sadr Amin prohibits merely the permanent alienation of family property by a manager in favor of his wife and children, and not their maintenance by him. Moreover, it is expressly stated in the next sentence that a man may give any self-acquired property he likes to his children, and there is nothing in the Aliyasantana law which relieves a man from the natural obligation of supporting, by his own exertions if necessary, his wife and children. It would be strange to maintain that a person is not civilly bound to do that which he is criminally punishable if he neglects or refuses to do. I think that there can be no doubt that a man is, under the Aliyasantana law, bound to support his wife and children, but the real question now at issue is whether while this obligation lasts the wife can claim an allowance from her own family. Under the Malabar law members of a family are not entitled to maintenance out of the family mansion; but the case is hardly analogous, as it is customary in Malabar for married females to continue to reside in the family mansion, and not, as in Canara, to live in their husband's houses. From the analogy of Hindu Law, however, under which a female cannot, during the lifetime of her natural supporter, claim maintenance from his family, to which she belongs, I think it is doubtful whether under the Aliyasantana law a married female living with her husband is entitled to any from her own family. But as I am not aware of any authoritative ruling on the subject, I do not feel justified in reversing the decision of the Principal Sadr Amin on this point."

1869. *January* 4. *S. A. No.* 238 *of* 1868.

The 1st defendant presented a special appeal to the High Court from the decree of the Civil Judge upon the ground that the plaintiff, being a woman under coverture and living with her husband in his house and under his protection, was not entitled to any maintenance from the defendants.

Upon the first hearing, the High Court directed that an issue be sent to the Civil Judge whether there was a custom in existence in Canara by which married women whilst living with their husbands and apart from their own family could claim maintenance from their own family.

The return of the Civil Judge stated that there was no such custom in existence in Canara.

Sanjiva Row, for the special appellant, the first defendant.

Rama Row, for *Srinivasa Chariyar,* for the special respondent, the plaintiff.

The Court delivered the following

JUDGMENT :— The plaintiff and the defendants in this case are members of a family which is governed by the Aliyasantana system, and the question the Court is called upon to determine is whether the plaintiff is entitled to a separate allowance for maintenance out of the income of the family property whilst living with her husband apart from the family.

The suit was obviously not brought to recover the necessary means of support but to obtain under the name of maintenance the separate enjoyment of a portion of the income of the property equivalent to the share of it which the plaintiff had failed to recover by her suit for a division. The claim in the plaint is very similar to that in the case of *Kunigaratu* v. *Aarrangaden,* 2, *Madras High Court Reports* 12, in which the suit was held not to be maintainable on the ground that it was an attempt to obtain indirectly relief which the plaintiff could not obtain directly. However, both the Lower Courts have considered the claim to simple maintenance open on the plaint, and we cannot say that they were wrong. The Principal Sadr

1869. January 4. S. A. No. 238 of 1868.

Amin, refusing to entertain the prayer for relief in the plaint on the ground that to do so would be an evasion of the Aliyasantana law prohibiting division, has decided that the plaintiff, although living apart with her husband, is entitled to an allowance sufficient to maintain her in a position in life similar to that of the other members of her family and decreed the payment to her in future of a monthly sum and the use of a house and furniture. The Civil Judge, taking the same view of the plaintiff's right but not it appears without doubt, has simply modified the decree of the Principal Sadr Amin's Court by reducing the sum ordered to be paid and disallowing the use of a house and furniture.

There is so little extant in the form of text or decision on the Aliyasantana system as to make doubtful questions of right under it dependent more or less on evidence of prevailing custom, and as in the present case the question turned materially on the existence or non-existence of a custom in Canara with respect to the residence and support of women after marriage, an issue on the point was sent to the Acting Civil Judge who decided the case on which he has returned the finding "That there exists no established custom amongst the inhabitants of Canara (following the Aliyasantana law) by which married women whilst living with their husbands and apart from their own family can claim maintenance from the latter."

The effect of this finding we understand to be that the Aliasantana system of Canara, unlike it seems the kindred Maroomakatayam system in Malabar, *(Strange's Manual, Section* 388,*)* permits but does not require married women to reside with their husband's apart from their own families, but that it is not an established custom that maintenance should be afforded by their families whilst they are so resident. It seems probable from one or two of the observations of the Judge, which accompany the finding, that claims of this kind have been made only since the decision in the case of *Munda Chetti* v. *Timmagee Hensu,* 1 *Madras High Court Reports,* 380, settling the law in regard to the non-divisibility of the family property at the suit of one member.

The case is thus left to be decided on the reasonable effect to be given to the Aliyasantana law in regard to the rights of the family collectively and individually in the family property, and to the nature of the marriage relation. The rule of law derivable from the recognized work of authority Bhutala Pandiya, (which we regret to find is still untranslated into English) and decided cases we take to be:—That the legal right to the family property is vested in the female members of the family jointly, but for little other practical purpose than regulating the course of succession. No severance of the joint estate can be effected compulsorily, and the possession and control of the property belongs exclusively to the yejaman or manager of the family who is ordinarily the senior of the female members, but subject to the obligation of providing proper support for all the other members, and they individually have no right to anything beyond such support.

So far the law appears to be settled, and imports clearly we think the preservation of the unity of family, as the only effectual mode of securing to the members severally a full share of the beneficial enjoyment of the joint estate. The obvious effect of allowing one or more members to quit the family and live apart on a portion of the income of the estate sufficient to support a position like that enjoyed by the other members would be to reduce the benefits to the family in a greater or less degree according to the number of the members who might choose to live separately on such allowances: and nearly as much so as by apportioning shares of the corpus of the property on a division. It seems to us therefore that the peculiar beneficial interest of the members individually in the family property is in its nature incompatible with separation from the family.

But as bearing against this view reliance was placed by the vakil for the respondent on the passage from Bhutala Pandiya, which is to be found accurately translated in the 4th Volume of the *Madras High Court Reports*, p. 30:—"The other living persons shall act in union. In this if misunderstandings arise between the elder and younger sisters, the elder shall provide the younger with a

1869. January 4. S. A. No. 238 of 1868.

house and household articles and have the management herself having a right (or claim) to urisiri." This passage, we think, imports no more than that the senior member should in case of disagreement charge the household arrangements in the way pointed out, for the sake of the quiet and good order of the family. Read with the context, it is in our opinion a confirmation of the view that living in the circle of the family under the management of its head is necessary to the right of support. Whatever too there is to be found of express authority on the question supports this view. The judgments of the Civil Court and this Court in the case of *Kunigarata* v. *Arrangaden* indicate the strong impression of two judges conversant by long experience with the customs of Malabar, that the members of a family governed by the Maroomakatayam law are only entitled to maintenance in the family house. Again in the chapter on Malabar Law in the *Manual* by Mr. Strange who had also considerable judicial experience in Malabar, it is laid down (Section 388) that " females whether in alliance with males or not reside in their own families," and we have no reason to suppose that there has been any distinction in that respect between the Maroomakatayam and Aliyasantana systems. We are on the contrary warranted in concluding that both systems enjoin the same condition. Mr. Strange in the same chapter, Section 392, states that " in its details the law of Aliyasantana corresponds with that of Maroomakatayam saving that the principle that the inheritance vests in the females in preference to the males is in practice better carried out in Canara where the management of property vests ordinarily in the females," and this is confirmed in the judgment of Mr. Justice Holloway in *Nunda Chetti* v. *Timmaju Hensu*, 1 *Madras High Court Reports*, 380. Referring to the Aliyasantana system, he observes " This system of inheritance differs only from that of Malabar in more consistently carrying out the doctrine that all rights to property are derived from females."

It remains to consider whether for any special reason arising out of the relation of husband and wife under the Aliyasantana system, a wife's residence with her husband should not be treated as a separation from her family. The

relation is in truth not marriage but a state of concubinage into which the woman enters of her own choice and is at liberty to change when and as often as she pleases. From its very nature then it might be inferred as probable that the woman remained with her family and was visited by the man of her choice; but the case in this respect is not left to mere probability. Such has undoubtedly been the invariable habit under the Maroomakatayam law, and although women in Canara under the Aliyasantana system do it seems in some instances live with their husbands, still there is no doubt that they do so of their free-will, and that they may at any time rejoin their own families. We do not therefore see that residence with a husband can be regarded differently from any other separation by the voluntary act of the wife, and this conclusion is strengthened by the fact that Bhutala Pandiya is silent on the subject of residence after marriage.

1869. *January* 4. *S. A. No.* 238 *of* 1868.

The ground of the husband's non-liability for maintenance on which alone apparently the Principal Sadr Amin's decision rests, is, we think, altogether unsound. He may be right in saying that a wife cannot legally be maintained out of the funds belonging to the family of her husband for the very reason that living with the husband is not a necessary duty of the wife. It does not, however, follow as the Civil Judge remarks in his judgment that a husband is not bound to afford necessary maintenance to the woman from his self-acquired means so long as she continues to live with him as a wife. It will probably be found that the general law does impose such an obligation, but even supposing that it does not, still his non-liability to support her could not alter in any way the legal effect of the wife's residence with him or her right to maintenance out of the property of her family.

For these reasons the plaintiff is not in our judgment entitled to enforce an allowance as for maintenance from her family. The decree appealed from must therefore be reversed and the suit dismissed.

With regard to costs, we think the case is one in which the parties should each bear her own costs in both the Lower Courts, but that the appellant's costs in this Court should be paid by the respondent.

Appellate Jurisdiction. (a)

Special Appeal No. 151 *of* 1868.

DATTI PARISI NAYUDU and 3 others...*Special Appellants.*
DATTI BANGARU NAYUDU and 3 others.*Special Respondents.*

The illegitimate son of a Sudra being the offspring of an incestuous intercourse (intercourse between a father-in-law and his daughter-in-law) is not entitled to inherit or share in the family property according to Hindu Law.

Semble.—To entitle the illegitimate sons of a Sudra by a Sudra woman to inherit a share in the family property, the intercourse between the parents must have been a continuous one, and the woman must have been an unmarried woman. Therefore the illegitimate son of a Sudra by a Sudra woman living with him in adultery is not entitled to a share in or to inherit the family property.

1869. *January* 4. *S. A. No.* 151 *of* 1868.

THIS was a special appeal from the decision of P. Srinivasa Rao, the Principal Sadr Amin of Vizagapatam, in Appeal Suit No. 104 of 1866, confirming the decision of the District Munsif of Vijayanagaram in Original Suit No. 77 of 1865.

The plaint was filed by the 4th plaintiff as the mother and guardian of the 1st, 2nd, and 3rd plaintiffs who were minors to recover a half share in the property situated in the village of Vangaru.

The plaint stated that the 1st, 2nd, and 3rd plaintiffs are step-brothers of the 1st and 2nd defendants, and the 3rd defendant is their step-sister, and the 4th defendant is father of the 1st, 2nd, and 3rd plaintiffs, and 1st, 2nd, and 3rd defendants.

The 1st defendant in his statement states that the property in dispute and some other property of much value are in possession of the 2nd and 4th defendants, and he has no property whatever in his own possession; that it is true that a document was executed to the 4th defendant for settling the division of the common property, but it was not divided according to the said document; that therefore he should be compelled to divide and give up his share, and that his costs ought to be ordered to be paid by the plaintiffs.

In the statement put in on behalf of the 2nd and 3rd defendants, it was alleged that the 4th plaintiff

(a) Present: Collett, and Ellis, JJ.

was first married to the 1st, 2nd, and 3rd defendants' deceased elder brother Ramu Naidu, by whom she begot two daughters; and on her husband's death, she lived in the defendants' house for two years; but having by secret illicit intercourse conceived the 1st plaintiff, she was turned out by all the defendants; that afterwards she continued to carry on her adulterous course publicly; that the 4th defendant kept the 4th plaintiff contrary to Hindu law even when the 1st plaintiff was 3 years old.

The 4th defendant supported the case made by the plaintiff.

The plaintiffs and 4th defendant stated at the first hearing of the suit that though the 4th plaintiff was the widow of the 4th defendant's eldest son, yet the 4th defendant married her according to the custom prevailing in their family. The 2nd and 3rd defendants contended that it was not their family usage to marry a daughter-in-law, and therefore the following issues were settled amongst others:—

I. Whether the marriage of a daughter-in-law by a father-in-law is consistent with the usage prevailing in the family of both the parties.

II. Whether the 4th defendant married the 4th plaintiff or not.

III. Whether the 1st and 2nd plaintiffs were born after the 4th defendant married the 4th plaintiff or not.

The District Munsif of Vijayanagaram found the three issues in favor of the defendants.

Upon appeal, the Principal Sadr Amin of Vizagapatam affirmed the decree of the District Munsif observing:—

It is clear that the alleged marriage between the 4th plaintiff and 4th defendant did not take place as a fact; that even if it had occurred, it was incestuous; and that the 1st plaintiff, and, according to the defendants' witnesses, the 2nd plaintiff also, were not the issue of the 4th defendant by concubinage at least.

A special appeal was preferred on behalf of the plaintiffs upon the following grounds:—

I. The parties in this case are admitted to be Sudras.

1859. January 4. S. A. No. 151 of 1868.

II. The 2nd and 3rd plaintiffs are therefore each entitled to, at all events, half such a share as falls to the lot of the 1st, 2nd, and 3rd defendants, though they have been declared to be the illegitimate children of the 4th defendant.

On the 6th July 1868, the High Court sent the following issue to the Principal Sadr Amin for trial:—Whether the plaintiffs or any and which of them are or is the illegitimate sons or son of the 4th defendant.

The finding of the Principal Sadr Amin was that the 1st and 2nd plaintiffs were not begotten by the 4th defendant and were not his sons, that the 3rd plaintiff was begotten by the 4th defendant upon his daughter-in-law whom he kept and was his son, but was not an illegitimate son of the 4th defendant in the sense in which the term illegitimate son is understood in Hindu Law. The following is taken from the judgment of the Principal Sadr Amin:—

The perplexity of the question of law to be solved; the absence (as far as I can see) of any precedents containing an exposition of such a knotty point of law, and the importance of the question, affecting, as it does, the whole class of Sudras, who form the bulk of the population in India, and who are fast growing into importance, induce me to enter into a minute discussion of the facts of the case, and of the laws applicable thereto at some unusual length.

First then, as to facts I find that nothing in favor of the 1st and 2nd plaintiffs has been proved, because

1st. The plaintiff's own witnesses admit that the 1st plaintiff was 3 years old when his mother the 4th plaintiff was kept by the 4th defendant. It is clear therefore that 1st plaintiff could not possibly be the 4th defendant's child, and, secondly, as to the 2nd plaintiff, the contending defendants plead that he had been conceived in the womb before his mother the 4th plaintiff was kept by the 4th defendant. This assertion is proved by the defendant's witnesses, who moreover add that 2nd plaintiff was born within only two or three months after the commencement of an intercourse between the 4th defendant and 4th plaintiff On the other hand, the plaintiff's witnesses throw no light

whatever on the matter. They state nothing beyond what is admitted on all hands, namely, that the 2nd plaintiff was born after the 4th plaintiff was kept by the 4th defendant; but how long afterwards the 2nd plaintiff was born, the plaintiff's witnesses do not profess to depose. This was the only disputed and essential point, and in this respect they maintain silence.

I find that of the three plaintiffs in the case, the 3rd plaintiff alone is the son of the 4th defendant by his daughter-in-law whom he kept; but I cannot, nevertheless, hold that the third plaintiff is therefore the illegitimate son of the 4th defendant in the sense in which the term "illegitimate son" is understood in the Hindu Law of Inheritance. I admit that an illegitimate son inherits from his Sudra father under the Hindu Law, but I deny that the term "illegitimate son" as it is known in the Hindu Law, is so very comprehensive as to include the issue of an incestuous or illegal marriage or intercourse.

According to the English Law, an "illegitimate son" is a general name applied to one born out of wedlock, and to the issue of a marriage effected within the prohibited degrees of affinity, &c., and such an illegitimate child has no right but what he can acquire; being in the eye of the law the son of nobody, he cannot be heir to any one, nor have any heirs, but of his own body. Therefore any spurious child may be called the illegitimate child of such a person, without injuring the interests of that person under the English Law. Then under the Mahomedan Law illegitimate children generally inherit from the mother, and mother's kindred alone, except in the instance of a son by a slave girl whom the father may have acknowledged as his son, in which case he succeeds to his father also, so that there, too, the interests of a putative father will not be injured by a certain child being called his illegitimate son. But the case is very different under the Hindu Law. Here we should be very cautious in classing one as an "illegitimate son" because the Hindu Law allows a spurious son to inherit from his Sudra *father*, but in doing so, confines the privilege to a certain kind of illegitimate sons only, and not to all indiscriminately.

1869. January 4. S. A. No. 151 of 1868.

The Hindu Law knows no such general term as "illegitimate son." Whenever the Hindu authorities had occasion to declare that among Sudras a certain kind of illegitimate son is capable of inheriting from his father, they have invariably taken care to call such spurious child by one particular name and none other, namely, "Dasipattra' (the son of a female slave)—Vide

(1.) Menu Chap. IX, verse 179 (Percival's edition, page 254.)

(2.) Vyvahara Mayukha, Chap. IV, S. IV, verse 32, (Stokes' edition, page 55.)

(3.) Mitakshara, Chap I, S. XII, verses 1, 2, and 3, (Stokes' edition, page 426.)

(4.) Dayakrama Sangraha, Chap. VI, verses 32 and 33, (Stokes' edition, page 513.)

(5.) Dattaka Mimansa S. II, verse 26, (Stokes' edition, page 551.)

(6.) Dattaka Chandrica S. V. verse 30, (Stokes' edition, page 659.)

(7.) Jaggannatha Tharka Punchanana, Book V. Chap. III, verse CLXXIV, (Colebrooke's Digest, Madras edition, II, 325.)

All the foregoing authorities concur in declaring that a son begotten by a Sudra on a (Dasi) "*a female slave,*" is entitled to inheritance. But who is "a female slave?" This term is defined in the gloss of Cullucabhatta (Sanscrit edition, Chap. IX, verse 179), to be the slave who was made captive in a battle, and such other kind elsewhere described; that is, one of the seven kinds of slaves mentioned by Menu in Chap. VIII, verse 415, (page 230) or one of the fifteen enumerated by Jaggannada (Colebrooke's Digest II, page 14). Mr. McNaughten in his work on Hindu Law II, page 15, observes that the word "female slave" is rigorously limited to one of the slaves expressly mentioned in the law.

But I find that the term (Dasi) "a female slave," has been extended to a woman exclusively kept by a man, so as to render her as it were a sort of secondary wife, as will be seen from the following authorities :—

1869. January 4. S.A. No. 151 of 1868.

(1.) Mitakshara, Vynahara Canda, Slokam 288 and Commentary in S. Teruvangada Charloo's Sanscrit edition (which portion, I think, is not yet translated into English.)

(2.) Jimuta Vahana (Dayabhaga) Chap. IX, verse 29, (Stokes' edition, page 288), where, for the first time, the words, "or other unmarried Sudra woman," are *added* to the words "female slave."

(3.) Jagannada in Book V, Chap. III, verse 174, notes (Digest, Higginbotham's edition II, page 325.)

(4.) Mr. Colebrooke's observations quoted in Vol. II, page 68 of Sir Thomas Strange's Hindu Law.

(5.) Madras High Court Decisions, Vol. II, page 293.

It is thus we see that the Hindu Law recognises only *two* kinds of illegitimate sons as being entitled to inheritance in a Sudra family; namely, 1st the son of any one of the fifteen descriptions of slaves expressly enumerated in the law; and 2nd, the son of a woman exclusively kept by the putative father.

The English authors, who have written upon the Hindu Law, have been very careful in using the words "illegitimate son." They do not simply say that an "illegitimate son" of a Sudra inherits from his father; but they distinctly state that an "*illegitimate son by a female slave*" inherits, &c., vide

W. H. MacNaughten, 2nd edition I, p. 18.
Elberling, Section 160.
A. Houston, page 57.
Sutherland, page 67, Volume II, of Sir Thomas Strange's Hindu Law.

But I confess there are some English authors on Hindu Law who use the words "illegitimate son" without the aforementioned affixes. These are Mr. T. L. Strange, (Section 335, 2nd edition), and Mr. Thompson, (Section 162). Both of them, however, have, for their authority, the dictum of Sir Thomas Strange, in Volume I, page 132, who in his turn relies upon Menu, Chapter IX, Section 178-9 and the Digest. Both these last-mentioned authorities, which I have above quoted in para. 10, do not go beyond

1869. January 4. S.A. No. 151 of 1868.

the limited expression, "*the son of a slave girl.*" Therefore, and because Sir Thomas Strange does not tell us in his work that he dissents from the said two original text writers, or that those texts have been superseded, &c., I am inclined to think that Sir Thomas Strange, in saying that inheritance is due to a Sudra's " illegitimate son," meant that kind of illegitimate son whom the original authors quoted by himself have expressly mentioned. Otherwise, *i. e*, if Sir Thomas Strange meant that the term " illegitimate son," as it is understood in the Hindu Law of Inheritance, comprehended all sorts of spurious sons, he would certainly have cited authorities for such a sweeping and novel assertion.

Having so far endeavoured to show by affirmative rules that the privilege given by the Hindu Law to a Sudra's son, other than the legitimate (inclusive of an adopted son of course), is limited to the son of a slave girl, and to the son of a woman exclusively kept, I proceed to notice some negative clauses in the Hindu Law, which prove that the issue of an illegal or incestuous union is *not* entitled to inheritance in a Sudra's family.

(1.) The author of the Smriti Chandrika in Chap. V, verse 10, (Krishnasawmy Iyer's edition, p. 67), says:— " The inheritance is not fit to go to the son of a woman " married in irregular order ; as also to the son of a woman " espoused by her kinsman (Sagotra) and to an apostate from " a religious order." The author then proceeds in verse 11, (page 68) to explain that, " the son of a woman married in irregular order," means, " the son of a woman married in violation of the rules of *tribe* or birth ;" and that, " the son of a woman espoused by her kinsman," means, " are born of a woman married to her own (Sagotra) kinsman," &c.

(2.) Jagannadha Tarka Punchananan in Book V, Chapter III, verse CLX notes (Colebrooke's Digest, Higginbotham's edition II, p. 317,) says, "a marriage not authorized either by recorded or traditional revelation is reprehensible ; and the son of such marriage shall have no share."

(3.) Ditto, ditto, Chapter V, verse CCCXXXVIII (Colebrooke's Digest, II, p 440) says, " The son born of any

woman who ought not to have been espoused is disinherited." 1869. *January* 4. *S. A. No.* 151 *of* 1868.

(4.) Ditto, ditto, Chapter III, verse CLXXIV notes (Colebrooke's Digest, II page 325) says, "a son by a female slave *not superior* in class to her Sudra master shall obtain the moiety of a full share."

(5.) Ditto, ditto, Chapter V, verse CCCXXXVI (Colebrooke's Digest, II page 439) says, "sons begotten on a " woman married in the inverse order of classes are no " sharers in the heritage."

(6.) Ditto, ditto, ditto, verse CCCXXXVII (Colebrooke's Digest, II page 440) says, " the son of a woman of superior class but married to a man of a lower tribe is not capable of inheritance." Again it is said, " the son who is born of a woman descended from the same primitive stock with her husband is not capable of inheritance."

(7.) The English authors too have adopted the foregoing provisions—vide Elberling, Section 160, and Sir Thomas Strange, I 40.

These are my authorities for stating that under the Hindu Law all kinds of illegitimate children do not inherit from a Sudra father indiscriminately, and that the issue of an illegal or incestuous union is expressly precluded from inheritance. I know that the marriage of a Sudra with a person descended from "*the same primitive stock*" is allowed by the Hindu Law (Colebrooke's Digest, II page 442, and Sir Thomas Strange, I p. 41). But I think that the words "the same primitive stock" are not susceptible of extension beyond a certain limit. Those words (*i. e.* "the same primitive stock") are used in English books to express the Sanscrit word (Sagotra), as admitted in Colebrooke's Digest, II p. 440 note; and the Sudras having no gotra are very properly placed beyond any restrictions with reference to gotra. But it does not therefore follow that the Hindu Law gives an unreserved license to a Sudra to form all sorts of incestuous alliances, and guarantees that the issue of such spurious intercourses shall have a due share in the family property.

The rules that forbid incestuous marriages are founded upon the laws of nature, having for their object

1869. January 4. S. A. No. 151 of 1868.

the preservation of chastity in families and between persons of different sexes, brought up and living together in a state of unreserved intimacy. It is true, however, that those rules are not the same for all the nations. Some authorise unions which others regard as the most criminal ; and some prohibit those which others esteem as the most innocent and yet all profess to follow what they call the rules of nature. But with all this, I do not think that there is any nation in the civilized world which has no rules of some kind or other in this respect, nor do I think that the conflicting nature of the rules existing for different people can afford any reason why the rules, which may have been deliberately enacted for a particular people, and which, when tested by the principle of utility, appear to be perfectly conducive to happiness in families, should be neglected in favor of any this or that section of a particular people, especially in the case of a Hindu, the prohibitary rules framed for whose guidance possess an additional force of their having been, like everything that is Hindu, founded upon religion, unless an exception is sanctioned in regard to that isolated section of the community. But I see that no such exception is to be found in the Hindu Law in favor of a Sudra; nor can I induce myself to believe that, with whatever contempt the Hindu Lawyers might have looked upon a Sudra in other respects, they should have thought it fit to set him free from the shackles of *any* such rules, and placed him on a footing of equality with the brute creation. On the contrary, I find that the Hindu Law prescribes rules, common to all that are amenable thereto, peremptorily forbidding alliances within certain degrees of affinity; and among those prohibited degrees, the daughter-in-law (*i. e.* the relationship in question in this case) is one; and she is classed equally with a daughter, a sister, a mother, &c. vide

Menu, Chapter XI, verse 59 (page 298.)

Vyavaharamayuka, Chapter XIX, verse 8, (Stokes' edition, page 162.)

Mitakshara, verse 230 of the Praya Schitta Canda ; Tiruvangadacharloo's Sanscrit edition, not translated into English.

In the face of the foregoing precepts of law and rules of nature, and in the face of the creditable progress which the people, classed as Sudras in the Hindu Law, have now been generally making in education and morals, I do not consider it justifiable to relieve any of them from the obligations of morality above spoken of. It is true the plaintiffs in this case set up a custom in favor of the alleged marriage and inheritance. But this alleged custom has not been proved as shewn in my former judgment, and is moreover opposed to daily experience. Such an incestuous intercourse does not seem to prevail even among a people, who still follow the vicious practice of polyandry.

As I have said above, there are no precedents on the point in question; but I suppose that their absence is attributable to the rarity, or rather the absence, of such cases. I find several decisions on the subject of an illegitimate son of a Sudra, in Rajah of Ramanaggur's case (Privy Council's Judgment, Sutherland's edition, page 313) in Pandaya Telaver's case (*Madras High Court Reports*, I page 478); and in Muthuswamy, J. Y. Naiker's case (*Madras High Court Reports*, II page 293), but all of them are, in my opinion, limited to questions raised in those cases regarding the son of a Sudra by a female *slave* or a *concubine;* but the general question whether the Hindu Law entitles *all kinds of illegitimate sons indiscriminately* to inherit from their Sudra fathers, does not seem to have been discussed or determined in the said cases.

Under all the foregoing circumstances I find the issue against the plaintiffs.

Sanjiva Row, for the special appellants, the plaintiffs.

Venkatapathy Row, for the first, second, and third special respondents, the defendants.

The Court delivered the following

JUDGMENT:—The finding of the Principal Sadr Amin upon the issue sent down by us concludes the 1st and 2nd plaintiffs, and they can recover nothing in the present suit. As to the 3rd plaintiff, the Principal Sadr Amin finds that in point of fact he is the son of the 4th defendant by the 4th plaintiff, and we think

1869. January 4. S.A. No. 151 of 1868.

that we must also take it as found that at the time of the procreation and birth of the 3rd plaintiff, the 4th plaintiff was exclusively kept (to use the terms of the Principal Sadr Amin's judgment) by the 4th defendant. It is not necessary for us to cite authorities to show what is quite clear, and has not been disputed before us, viz., that there could not possibly have been any legal marriage between the 4th plaintiff and the 4th defendant, and that their intercourse was incestuous. It must also be taken as settled law that the illegitimate sons of Sudras are entitled to share in the family property along with legitimate sons, and though the present suit is for partition in the life-time of the father, yet the objection which was suggested on this score, if it has any foundation, is overcome by the fact that the father is in the present instance an assenting party to the partition sought for.

The sole question for our consideration is that on which the Principal Sadr Amin has decided against the 3rd plaintiff, viz., whether the illegitimate son of a Sudra being the offspring of an incestuous intercourse is entitled to share in the family property. All references to the English or Mahommedan laws, or to supposed law of nature, are irrelevant, as they cannot assist to a decision of this case which must be entirely governed by the Hindu law. Nor can we allow ourselves to be influenced by any consideration of the increasing importance of the cast of Sudras in the present day. After the decision of this Court reported in II *Madras High Court Reports* 293, we think it quite unnecessary to review the numerous texts cited by the Principal Sadr Amin (to which we could readily add others) wherein the word " Dasi" is used. We are governed by that case and are well satisfied to be so. There is the authority of both Hindu and English writers on Hindu Law to show, and indeed it was conceded in argument before us, that the illegitimate son of a Sudra by " an unmarried Sudra woman" is entitled to share in the family property. It is also quite unnecessary for us to review the texts cited by the Principal Sadr Amin with reference to marriages between Hindus who are *sagotra*. In the first place, the use of the term *sagotra* shows that those texts refer only to the three regenerate casts, and

1869. January 4. S. A. No. 151 of 1868.

in the next place, there is no question in the present case that there could have been no legal marriage between the parties and that their intercourse was simply incestuous.

We should also probably be prepared to agree with the Principal Sadr Amin that to entitle the illegitimate sons of a Sudra by a Sudra woman to participate, the intercourse between the parents must have been a continuous one; there must have been an established concubinage, or in other words, the woman must have been one "exclusively kept" by the man. But it is unnecessary for us to decide that point, for upon the facts as found in this case we take it to be clear that the intercourse between the 4th plaintiff and 4th defendant was a continuous and exclusive concubinage.

When the matter for consideration is thus reduced to its proper dimensions, the question left for decision is the short one we have stated above. It is admitted that there is no express authority to be found upon the point. We are of course not at all inclined to extend the legal recognition of concubinage among Sudras beyond what the terms of the law require, and we think that the phrase "other unmarried Sudra woman" used by the authors alluded to above may rightly be applied strictly and establishes that the illegitimate son of a Sudra by a Sudra woman living with him in adultery would be excluded from participating in the family property. Then we think that there is authority for holding that the son of a Sudra by a woman of one of the regenerate or superior castes would similarly be excluded from participating in the inheritance of his natural father, and for this we think it sufficient to refer to *Daya Bhaga*, Chap. V, Art. 14, *Smriti Chandrika* (Kristnaswamy Iyer's Translation) pp. 63, 64, Arts. 11 and 14, and the texts cited and the comments thereon to be found in 3 *Colebrooke's Digest* pp. 129, 143, 325, 326. The fair result we think of these express authorities is to indicate the principle that though the law recognizes concubinage among Sudras and admits the illegitimate sons of the concubine to participate in the estate of the father along with the legitimate sons by his wife, yet that the illegitimate sons will be excluded from this privilege where the intercourse between their parents was one in

1869. January 4. S. A. No. 151 of 1868. violation of or forbidden by the law, and clearly an incestuous intercourse is of this nature. Upon this ground we think that we are justified in concurring in the judgment of the Principal Sadr Amin that though in point of fact the 3rd plaintiff in this suit is the illegitimate son of the 4th defendant by the 4th plaintiff, yet as intercouse between a father-in-law and his daughter-in-law is clearly forbidden and incestuous, the 3rd plaintiff is not entitled to participate with the other defendants, the legitimate sons of the 4th defendant, in the family property.

We therefore confirm the decrees below and dismiss this special appeal with costs.

Appellate Jurisdiction (a)

Referred Case No. 39 *of* 1868.

LAKSHMANAIYAN *against* SIVASAMY ROW.

Where a writing signed by the defendant was in these terms, " S. (defendant) holds Rupees 475 which sum is the property of L, (the plaintiff).

Held, that the document could not be considered a written contract or engagement.

1869. January 6. R. C. No. 39 of 1868. THIS was a case referred for the opinion of the High Court by A. Annasawmy, the Acting Principal Sadr Amin of Tanjore, in Small Cause No. 350 of 1868.

The plaintiff brought this suit on the 29th August 1868 to recover a sum of rupees 200 due by defendant under a written document (marked as exhibit A, dated the 24th October 1864), which was in the following terms :—

" 24th October 1864, Sivasawmy (defendant) holds " rupees 475 which sum of four hundred and seventy-five " rupees is the property of Lutchmanien (plaintiff.)

(Signed) " SIVASAWMY."

The defendant pleaded that the claim was barred under Clause 9, Section 1 of Act XIV of 1859, inasmuch as the document sued upon could not be regarded as a written contract."

(a) Present : Scotland, C. J. and Collett, J.

The Principal Sadr Amin was of opinion that the document was not a written contract, in the terms of the latter part of the Section relied on, inasmuch as it contained no engagement to pay the money lent or contract to be bound thereby; but he referred the following question to the High Court:— 1869. *January* 6. *R. C. No.* 39 *of* 1868.

Whether the documnet A as it stands can be considered as a written contract or not?

Snell for the defendant.

The Court delivered the following

JUDGMENT:—The question submitted is whether the document A can be taken to be a written contract, or in other words, whether it expresses a perfect contract. The document runs thus:—"S holds 475 rupees, which sum is the property of L;" that is to say, by this writing S, the defendant, acknowledges that he has property of L, the plaintiff, worth so much. To that extent therefore it evidences that the defendant is in the relation of depositary or trustee to the plaintiff, but the writing expresses no object matter; nothing in the nature of a promise undertaking or engagement without which there can be no contract. The document may be abundant evidence from which the law would imply a promise, but to get in the promise resort must be had to the implication of law, from the acknowledged tie or relation. It is not expressed in writing. We are therefore of opinion that the document A cannot be considered a written contract or engagement.

Original Jurisdiction. (a)

Original Suit No. 365 *of* 1868.

BAVAH MEAH SAIB.......................*Plaintiff.*

KHAJEE MEAH SAIB and others ....*Defendants.*

Where an agreement in writing was signed by the plaintiff and the defendants at Secunderabad in the territories of the Nizam for a partnership in a tannery business to be carried on at Bakaram, near Hyderabad, and by the terms of the agreement the tanned skins were to be sent to the plaintiff at Madras for sale or shipment to England, and hundies in respect of the goods sent to Madras were to be drawn upon the plaintiff at Madras and paid by him and accounts of the partnership transactions were to be sent to the plaintiff once in eight days.

Held, in a suit for an account of the partnership dealings, that the cause of action had arisen in part within the Original Civil Jurisdiction of the High Court, and, the leave of the Court to bring the suit having been obtained under Section 12 of the Letters Patent of 1865, that the Court had jurisdiction to entertain the suit.

Held also that the jurisdiction of the Court was not affected by the circumstance that the defendants were non-resident foreigners.

1869. *January* 6. *O. S. No.* 365 *of* 1868.

THE plaint, which set forth that the defendants resided at Secunderabad, in the territories of His Highness the Nizam of Hyderabad, prayed for an account of partnership transactions, and that the partnership which subsisted between the plaintiff and defendants be declared to have been dissolved from the 1st of January 1868.

The plaint stated that, on the 23rd of March 1867, the plaintiff, the father of the 1st and 2nd defendants, and the 3rd, 4th, and 5th defendants entered into a partnership agreement whereby it was agreed that the parties should carry on the business of a tannery at Secunderabad, and the agreement provided for the shares of the parties in the partnership business. It was agreed that the skins when tanned and dressed were to be despatched to Madras to the plaintiff who was to export the skins or to sell them at Madras, and that the accounts of the partnership should be examined yearly. The plaintiff contributed the amount of capital to the partnership provided in the agreement, and he effected sales of several consignments of tanned skins sent to him from Secunderabad partly at Madras and partly by export to London, but the accounts relating to the shipments to London had not been received. On

(*a*.) Present: Bittleston, J.

the 5th of January 1868, the defendants wrote to the plaintiff informing him that his interest in the partnership had ceased on the 31st December 1867. The defendants had furnished accounts of the partnership business to the plaintiff up to November 1867, but they did not contain full and correct particulars of the partnership transactions.

The following is a copy of the material portions of the agreement:—

" Agreement executed at Secunderabad on the 23rd " March 1867. We at present residing at Secunderabad " Madras Bava Meah Saib, Myboob Saib, Sydumeah Saib, " Mahomed Moorad Saib, and Lateef Saib, respectively, do " hereby join and agree to execute this partnership agree- " ment having deposited Soogoor Rupees 16,000 for the tran- " saction of Tannery business at Bakaram, in the vicinity " of Hyderabad, namely, Rupees 10,000 for four-seventeenth " share of Bava Meah Saib, Rupees 2,000 for the two " seventeenth share of Myboob Saib, Rupees 4,000 for the " two-seventeenth share of Sydumeah Saib, total Rupees " 16,000 for eight-seventeenth shares: six-seventeenth " share to Mahomed Murad Saib and two-seventeenth " share to Lateef Saib for management, and one-seventeenth " share for charity purposes, total shares 17. The profit that " may remain after deducting the original amount, expenses, " losses, commissions, interest, &c., to be divided amongst, " the seventeen shares. Besides this all transactions, such as " receipts, debits, writing chits, vouchers, &c., should be car- " ried on in the name of Bava Meah Saib and Mahomed " Moorad Saib, but in the invoice of goods that may be des- " patched to Madras, the signatures of Myboob Saib and " Mahomed Moorad Saib should be affixed showing in them " that the goods despatched by Myboob Saib and Mahomed " Moorad Saib are consigned to Bava Meah Saib at Madras. " The hundies sent from here should be written by both " Myboob Saib and Mahomed Moorad Saib. The accounts " should be properly closed and adjusted every year, but at " the time of division the accounts of all the debtors should " be arranged according to their state as was done on the " 20th February 1867, and settlements made. An account " should be sent every eighth day to Madras."

The plaintiff was examined as a witness, and gave evidence in support of the statements in the plaint. He also stated that he received at Madras the daily account of the partnership dealings, sometimes once in eight days, sometimes once in fifteen days, down to the 30th of November 1867, and he produced letters signed by the defendants promising to settle accounts at Madras. The plaintiff also stated that all the tanned skins were received by him at Madras and were sold at Madras or shipped to Europe by him, and that he paid at Madras the hundies drawn upon him by the 4th and the father of the 1st and 2nd defendants.

Mayne for the plaintiff.

O'Sullivan and *Miller* for the defendants.

The defence was that the Court had no jurisdiction to decide the suit.

The following judgment was delivered by

Bittleston, J.—This is a suit for an account of the partnership transactions between the plaintiff and defendant and for payment of what may be ascertained to be due to the plaintiff, and the only question which I have now to determine is whether this Court has jurisdiction to maintain this suit.

The defendants are not resident nor are they carrying on business within the local limits of this Court's ordinary original jurisdiction; and upon the statement in the plaint it must be taken, I think, that they are the subjects of a foreign independent State resident within the territorial limits of that State, but the contention of the plaintiff is that the cause of action arose, in part at all events, within the local limits of the ordinary original jurisdiction of this Court, and that as the leave of a judge for the institution of the suit has been obtained, this Court has jurisdiction to hear and determine it under Section 12 of the present Charter.

The facts are, that the plaintiff who is a resident at Madras, entered into a contract of partnership with the father of the 1st and 2nd defendants and with the other defendants in March 1867 at Secunderabad, with respect to the business of a tannery which had been established at a village attached to Hyderabad.

The capital was supplied by the plaintiff by the father of the 1st and 2nd defendants and by the 3rd defendant, and the 4th and 5th defendants were to have shares and to manage the business of the tannery. By the contract it was provided that the business should be conducted in the names of the plaintiff and of the father of the 1st and 2nd defendants; but that the receipts for goods sent to Madras should be drawn in the names of the father of 1st and 2nd defendants and of the 4th defendant as consignors and of the plaintiff in Madras as consignee, and that the hundies drawn from Secunderabad should be drawn by the same two persons. Further it was provided that the Day Book should be sent to Madras once in eight days, and that every year the account should be examined and closed.

In accordance with this agreement, it appears from the plaintiff's evidence that the business of the partnership was carried on partly at Secunderabad, where the tannery was situate and the skins were tanned, and partly at Madras, where all the tanned skins were received by the plaintiff and were by him either sold or shipped to Europe. The plaintiff states that no skins were sent elsewhere for sale, but that rejected skins only were sold at Secunderabad. At Madras therefore the plaintiff conducted the whole business of selling the partnership goods; and there he received the sale proceeds and paid the hundies drawn upon him by the 4th defendant and the father of 1st and 2nd defendants. The plaintiff received accounts from Secunderabad, and sent accounts to Secunderabad, and in the written agreement there is no express arrangement as to the place where the final settlement of accounts between the parties should take place, nor where any balance found due should be paid. Neither can it, I think, be safely inferred from the circumstances of this case, that the intention of the parties was that each of them should be liable to account and to pay what should be due from him only at the place where he resided and carried on the business—for some accounts were certainly required to be rendered by defendants to plaintiff at Madras, and the letters put in by the plaintiff shew that some of the defendants did contemplate a journey to Madras for the purpose

1869. January 6. O. S. No. 365 of 1868.

of settling accounts with the plaintiff. Further the liability to account and to pay does not arise solely out of the contract of partnership, but also out of the partnership dealings under the contract wherever carried on, and if one partner seeks by a suit an account of those dealings, he must be prepared in that suit to render an account on his part of his share in the transaction; it is the account of all the partnership dealings which must be taken, and as the result of the account, either of the parties may be ordered to pay to the other the balance found due. Therefore as regards a suit of this nature, when it appears that the partnership business is carried on substantially in two or more places, I think that the cause of action does partly arise in each of those places within the meaning of Section 12 of our Charter. The weight of authority also appears to me to be in favor of so holding, and the case of *Lutchmee Chund* v. *Zorawur Mull* (8 Moore I. A 291) is, I think, distinguishable, for that case was decided on the ground that the whole business of the partnership was substantially carried on at one place, viz., Muttra, which was within the jurisdiction of the Court in which the suit was brought. From the statement of that case it appears that the partnership books were kept at Muttra, the capital was supplied by the plaintiffs at Muttra and was employed by their agent there in the purchase of opium for the co-partnership ; that the opium was sent to Bombay and China for sale, and the account sales and proceeds were remitted to Muttra, where also the accounts were closed and the balance sued for was struck. The Court, in giving judgment said, that although the contract was entered into at Rutlam, yet it was for the establishment of a partnership " which was to be carried on principally at Muttra where all the transactions were to be conducted by means of capital embarked in the concern at that place," and that being a suit for a balance which had been struck at Muttra, the Court held that the cause of action for that balance arose there. In the present case all the transactions connected with the sale of the partnership goods took place at Madras,—there the goods were shipped or sold,—there the account sales and sale proceeds were received, and there the money was paid by the plaintiff to the order of the partnership on the partnership account.

The decision in the Privy Council therefore does not lead me to suppose that in the circumstances of this case, that Court would be of opinion that the cause of action did not in part arise at Madras.

At my suggestion, however, the further question has been discussed whether assuming that the cause of action did in part rise within the local limits of this Court's ordinary original jurisdiction, that fact is sufficient to authorize the Court to entertain the suit against foreigners who are not resident within the British territory. So far as the duty of this Court is concerned, this is still only a question of the construction of the Charter,—for upon all questions of jurisdiction reference must of course be made to the Charter, by which under the provisions of an Act of Parliament, this Court is constituted, and if by the language of the Charter the jurisdiction is clearly given, the Court cannot refuse to exercise it. But before assuming to exercise jurisdiction over non-resident foreigners, the Court should certainly require it to be satisfactorily made out that it was the intention of the framers of the Charter to give such jurisdiction. No presumption can be made in favor of it. The question then in the present case is whether the words of the 12th Section of the Charter giving this Court power to try suits of every description " if in the case of suits for land or other immoveable property such land or property shall be situate, or in all other cases, if the cause of action shall have arisen either wholly, or, in case the leave of the Court shall have been first obtained, in part within the local limits of the ordinary original jurisdiction of the Court" apply to suits against non-resident foreigners. The language is quite general; and it makes the jurisdiction depend in suits for land or the situation of the land, and in other suits on the locality of the cause of action. As to land, it cannot be doubted that the intention was to make the provision applicable to suits against non-resident foreigners; for the *forum rei sitae* is that which is universally recognized by the jurists of all nations as a competent if not the only competent *forum* for suits relating to immoveable property, whether the defendants are foreigners or subjects resident or non-resident. Is there then any sufficient ground for supposing that a different intention existed

1869. January 6. O. S. No. 365 of 1868.

with respect to the other suits mentioned in the same clause as to which jurisdiction is made to depend on the locality of the cause of action? It is manifest that the ground of jurisdiction is quite independent of residence within the local limits; for residence or trading or working within these limits is made a separate ground of jurisdiction in the latter part of the 12th clause, and the procedure which is sanctioned by the Charter provides for the service of process upon defendants not resident within the territories of British India. British subjects, wherever resident, appear to be certainly amenable to the jurisdiction of the Court, if the cause of action against them arises wholly, or, in the case the leave of the Court be obtained, in part within the local limits. Then as regards foreigners, suppose that the words had been (as they were in the first Charter establishing the High Court,) "if the cause of action shall have arisen," meaning thereby the whole cause of action—would it have been, according to the principles referred to by Lord Chanceller Westbury and the Master of the Rolls, Lord Romilly in *Cookney* v. *Anderson*, 32 L. J. Chan. pp. 308 and 428, an unwarrantable invasion of the sovereignty of other States to hold that jurisdiction was thereby given against non-resident foreigners? I think not. Both those learned Judges distinctly recognized that there are many cases in which, by the comity of nations, the tribunals of a country may be invested with extra territorial jurisdiction even against foreigners; for (says Lord Westbury) "where it is well settled by the comity of nations that any question of private right falls to be decided by the law of a particular country, it would seem reasonable that the Courts of that country should receive jurisdiction, and the power of citing absent parties though residing in a foreign land. Thus, by way of example, it is generally agreed by European nations that all questions relating to the ownership of land must be decided by the *lex loci rei sitae*; that all questions relating to the succession or administration of the property of a deceased person whether testate or intestate, belong to the judge of the domicile of the deceased, and that contracts ought to be applied and interpreted by the law of the place where they are made, and where it is intended they should be performed.

If therefore an action or suit be commenced in the Court of a particular country relating to a subject, which by this consent of nations is appropriated to the law of that country, it may be right, in order to prevent a failure of jurisdiction, to give to such Courts the power of exercising complete jurisdiction, and therefore of citing absent parties under the penalty, if they do not appear, of having judgment pronounced against them in their absence." Lord Westbury was of opinion that the Court of Chancery had gone beyond this legitimate exercise of power in the general language of one of its rules (the 7th of the 10th Consolidated Orders), and that its effect must be restrained within narrower limits. But that opinion has since been overruled in *Drummond* v. *Drummond* 36 L. J. Ch. 153. However the general principles stated by him have not been impeached, and they are in accordance with the opinions of most writers of authority on private international law—(See *Story's Conflicts of Laws*, Sec. 537, *Phillimore*, Section 886. See also Sec. 652, where the writer adopts the rules laid down by Savigny as to the local law which should govern on obligation and the jurisdiction to which it is subject, which rules are also referred to by Mr. Justice Holloway in his Judgment in the case of *Desouza* v. *Coles* at page 415 of *Volume* 3, *Madras High Court Reports*.)

It appears to me therefore there is nothing contrary to well-recognized principles of private international law in holding that the Charter of this Court gives jurisdiction to hear and determine a suit against non-resident foreigners when the cause of action arises within the local limits of its ordinary original jurisdiction, and the case of *Lutchmee Chund* v. *Tarwar Mull* is a distinct authority in favor of so holding. Further to hold the contrary would be productive of special inconvenience and injustice with reference to the circumstances in which this Court is placed, for the subjects of the Rajah of Mysore as well as those of the Nizam have necessarily frequent commercial transactions with the inhabitants of Madras, and the effect would be, that though the transactions should be begun and completed in Madras, the Madras merchant would be unable to bring his suit in the Courts here against the native resident at Bangalore or Hyderabad.

1869. January 6. O. S. No. 365 of 1868.

By the terms of the present Charter of the High Court, the jurisdiction is carried a step further; for by leave of the Court the suit may now be brought here if only a part of the cause of action has arisen here. This language doubtless gives rise to nice questions as to what is sufficient in any particular case to constitute a part of the cause of action, but having reached the conclusion that under the terms of the Charter foreigners are amenable to the jurisdiction when the whole cause of action arises here, I think it impossible to draw a line there and say that it was not also the intention to include them when jurisdiction is given on the ground of a part of the cause of action arising here. It may also be observed that this provision of our Charter goes no further in principle than Section 19 of the English C. L. Procedure Act 1852, which gives the English Courts a discretionary power of proceeding with a suit against a foreigner resident abroad upon being satisfied that there is a cause of action which has arisen within the jurisdiction or in respect of the breach of a contract made within the jurisdiction (See *Allhusen* v. *Melgarego*, 37 L. J. Q. B. 169.)

The framers of the new Charter have evidently considered that it might be left to the discretion of the Court either to assume or decline jurisdiction in cases in which part only of the cause of action has arisen within the local limits of the Court's ordinary original jurisdiction, and if in any case in which the jurisdiction is exercised, it should become necessary to resort to a foreign tribunal to enforce the decree that tribunal would probably, before enforcing it against subjects of its own State, consider whether the discretion had been properly exercised; but the question whether the Courts of the foreign country in which the defendants are inhabitants would enforce it is a different question from that of the jurisdiction of the Court in which the suit is brought to pronounce the decree. On this point I may refer to the observation of V. C. Stuart on the last occasion when the case of *Drummond* v. *Drummond* was before him on the hearing of the cause (37 L. J. Ch. 819.) "The necessary intervention of a foreign Court in aid of a judgment of one of our own has never been considered a reason for this Court refusing to entertain jurisdiction," and to that of Lord Justice Turner at a previous stage of the same case (Vol. 36, p. 161) with reference to the

Chancery Orders authorising service of process out of the jurisdiction:—" If in consequence of these orders any decree be made against a person out of the jurisdiction, it will be for the Courts of the country in which he may reside to determine whether the decree should be enforced against him."

1868. *January* 6. *O.S. No.* 365 *of* 1869.

Upon the whole, therefore, I come to the conclusion that this Court has jurisdiction to proceed with this suit, and I must refer it to a Judge in Chambers to take an account of the partnership dealings between the plaintiff and the defendants under the contract of partnership in the plaint mentioned. And the further hearing of the suit will stand adjourned until the usual time after the Judge's certificate has been made.

Appellate Jurisdiction (a)

Civil Miscellaneous Regular Appeal No. 278 *of* 1868.

OLAGASUNDARAM PILLAY and 28 others...*Petitioners.*

MUTTIEN CHETTY............................ *Counter Petitioner.*

By Madras Act VIII of 1865, an appeal from the decree of the Collector lies to the Civil Court. The Civil Judge has no power to refer appeals under the Act to a Principal Sadr Amin for disposal.

The power of a Civil Judge to transfer appeals to a Principal Sadr Amin is confined by clause 3, Section 8 of Act VII of 1843, to appeals from District Munsifs.

THIS was an appeal against an order of J. R. Daniel, the Acting Civil Judge of Madura, dated the 2nd of October 1868.

1869. *January* 22. *C. M. R. A. No.* 278 *of* 1868.

The petitioners were the defendants in a suit before the Deputy Collector of Madura under Madras Act VIII of 1865, who on the 13th of June 1866 passed a decree against the defendants. Petitioners appealed to the Civil Judge, who referred the appeal to the Additional Principal Sadr Amin for disposal. The Principal Sadr Amin by a decree dated the 6th of September 1867 confirmed the decree of the Deputy Collector.

On the 12th of August 1868 the petitioners presented a petition to the Civil Court stating that the decree of the

(a) Present : Scotland, C. J., and Collett, J.

1869. January 22. C. M. R. A. No. 278 of 1868.

Additional Principal Sadr Amin was inoperative, and praying that a decree should be passed on the merits by the Civil Court.

By an order dated the 3rd September, the Civil Judge (G. R. Sharpe) directed that the appeal from the decree of the Deputy Collector be re-posted for hearing. The Civil Judge observed that the appeal was preferred in regular course to the Zillah Court, and there was no provision under which the Zillah Judge could divest himself of the responsibility thereby thrown upon him to decide it.

Upon the case coming on for hearing, the Acting Civil Judge held that it was not competent to him to re-open the case, and pass another judgment in appeal (without entering into the question whether the Civil Judge had authority to refer the appeal to the Additional Principal Sadr Amin for disposal,) inasmuch as he could not reverse the decree of the Principal Sadr Amin.

From this decision the petitioners appealed to the High Court upon the ground that the Acting Civil Judge ought to have heard and determined the appeal.

O'Sullivan, for petitioners.

The Court delivered the following

JUDGMENT:—This was a suit instituted before the Collector under Madras Act VIII of 1865 in which he made a decree. Under Section 69 of that Act, an appeal from that decree was preferred to the Civil Court, and the then Civil Judge referred the appeal for disposal to the Principal Sadr Amin who heard the appeal and made a decree confirming the Collector's decision. Upon petition by the appellant, the succeeding Civil Judge held the transfer of the appeal to the Principal Sadr Amin illegal, and ordered the appeal to be re-posted for hearing in the Civil Court, which was done.

Before the day of hearing, there was another Civil Judge appointed, and he held that the decree of the Principal Sadr Amin was valid, and that he could not re-hear the appeal.

From that order the present appeal is brought.

The Madras Act VIII of 1865 expressly limits the appeal to the Civil Court, and the power vested in a Civil Judge to transfer appeals to a Principal Sadr Amin is given by clause 3, Section 8, Act VII of 1843, and is confined to "any appeals from District Munsifs which may be filed in a Zillah Court."

1869. January 22. C. M. R. A. No. 278 of 1868.

We are therefore of opinion that the decree by the Principal Sadr Amin was made without jurisdiction and is a nullity, and the order now appealed from must be set aside, and the appeal set down for hearing in due course in the Civil Court.

Appellate Jurisdiction. (a)

Criminal Petition No. 247 *of* 1868.

PANCHANADA TAMBIRAN..........................*Petitioner.*

A Criminal Court inflicting a fine for contempt of Court should specifically record its reasons and the facts constituting the contempt, with any statement the offender may make, as well as the finding and sentence.

Where this course was not adopted, the High Court set aside the order inflicting a fine.

THIS was a petition against an order of the Session Judge of Madura, dated 13th October 1868.

1869. January 22. C. P. No. 247 of 1868.

The petitioner preferred a charge of criminal trespass under Section 447 of the Indian Penal Code against one Chappani Muthu Pillay. The charge was dismissed by the Assistant Magistrate of Madura, whereupon the petitioner presented a petition to the Court of Session complaining of the dismissal of the charge, and asking the Court of Session to direct the committal of the defendant for trial by that Court under Section 434 of the Code of Criminal Procedure upon a charge of dacoity, and also to ask for the sanction of the High Court to institute criminal proceedings against the Deputy Collector who had investigated a charge preferred by the defendant Chapani Muthu Pillay against the petitioner which was also dismissed, founded upon the irregularity and illegality of the Deputy Collector's proceedings.

(a) Present: Scotland, C. J. and Collett, J.

1869. January 22. C. P. No. 247 of 1868.

The Session Court rejected the petitions by an order dated 10th July 1868. The petitioner presented another petition to the Session Court asking for authenticated copies of certain orders passed upon his petitions and the return of certain documents which had been filed with the petitions. This petition was rejected on the ground that it was insufficiently stamped.

In the course of the proceedings connected with the petitions, the Session Judge of Madura fined the petitioner Rupees 50 for a contempt of Court, the nature of which did not appear, and the amount of the fine was paid.

On the 10th October 1868, the petitioner applied to the Acting Session Judge for a copy of the order fining him, and praying that the amount of the fine should be returned to him.

Upon this petition, the Acting Session Judge passed an order dated 13th October 1868, setting forth that no written order had been passed imposing the fine, as ought to have been done under Section 163, Code of Criminal Procedure, but an entry in the accounts showed that the fine had been collected. The Acting Session Judge had no means of judging of the merits of the case nor of remitting the fine, as the order imposing it had been passed by his predecessor.

The petitioner presented a petition to the High Court under Section 404 of the Criminal Procedure Code, praying that the fine collected from him without any written order authorizing its imposition should be ordered to be returned to him, and also asking for permission to prosecute the Deputy Collector and others.

Karnakara Menon, for the petitioner.

The Court delivered the following

JUDGMENT:—It appears from the return made by the Acting Session Judge that the fine of 50 Rupees was levied from the petitioner for some alleged contempt of Court. The law requires that a Criminal Court inflicting a fine for contempt of Court should specifically record its reasons, "the facts constituting the contempt with any statement the offender may make as well as the finding and sentence.

In this case no reasons have been recorded, and we must therefore suppose that there was in fact no good ground for fining the petitioner. The order must be set aside. It is accordingly ordered that the order of the Ses sion Court fining the petitioner be, and it hereby is quashed, and that the fine levied be returned to the petitioner.

1869. *January* 22. *C. P. No.* 247 *of* 1868.

Appellate Jurisdiction (a)

Special Appeal No. 369 *of* 1868.

PUDIYAR VASUDAVAN NAMBUDRIPAD. *Special Appellant.*

KEYAKA KOVILAGATHA VALIA RANY and 5 others............................ } *Special Respondents.*

The provisions of Section 170 of the Code of Civil Procedure ought to be exercised with the most temperate discretion.

Where the Court might have treated one of the defendants as in default and passed judgment against him under the above Section, but instead of doing so passed over the default and made an order adjourning the further hearing of the suit, and on the day to which the hearing was adjourned disposed of the suit under Section 170,

Held that the Court by its own act was not in a position to treat the defendant as in default.

THIS was a Special Appeal against the decision of G. R. Sharpe, the Civil Judge of Calicut, in Regular Appeal No. 54 of 1868, modifying the decree of the Court of the District Munsif of Calicut in Original Suit No. 1,368 of 1861.

1869. *February* 12. *S. A. No.* 369 *of* 1868.

The Advocate General and *Karnakura Menon* for the special appellant, the second defendant.

Sanjiva Row, for the 1st, and *Parthasarthy Aiyangar*, for the 3rd special respondent, the plaintiff and the 39th defendant.

The facts appear from the following

JUDGMENT:—In this suit judgment was given against the 2nd defendant under Section 170, Civil Procedure Code, on two alleged grounds of default; (1) that he failed to attend to give evidence in accordance with a summons; and (2) that he failed to produce a certain document. It now turns out on further enquiry that the 2nd defendant never was served with any summons, but merely with a

(a) Present: Scotland, C. J., and Ellis, J.

1869. *February* 12. *S. A. No.* 369 *of* 1868.

notice to show cause why he should not attend to give evidence. The first ground of default therefore entirely fails. As to the second ground, it appears that he was required to produce a certain document on the 8th November 1867, and he failed to do so, but on the 25th November he presented a document along with a petition alleging that no such document as that described in the notice served on him ever existed, and that that the only document which had been filed by him in the former suit specified in the notice was the document he then produced. It appears that the Court of First Instance on the same date took and filed in the record a copy of the document, returning the original marked as " rejected." It is clear that the 2nd defendant was not rightly treated as in default in respect to the non-production of the document required of him; for in the first place he was entitled to require that the Court of First Instance should inquire and decide whether the document produced was the only document filed in the former suit, or whether the 2nd defendant was in possession of the precise document described in the notice before it adjudged him to be in default for its non-production. There is nothing whatever to show that the Court of First Instance made any such enquiry, and certainly no decision on the point has been recorded by it. Then in the next place the Court had itself failed to comply strictly with the terms of Section 170, Civil Procedure Code. The Section provides that, on default being made, the Court may pass judgment against the party or may make such other order as may seem proper. It may be that on the 8th November the Court might have treated the 2nd defendant as in default and have passed judgment against him, but instead of doing so, it passed over the default and made an order adjourning the suit, and at the adjourned hearing on the 7th December 1867 the suit was finally heard and disposed of, so that subsequently to the 8th November the Court by its own act never was in a position to treat the defendant as in default or to deal with him under Section 170. The Lower Appellate Court no doubt decided that the document produced by the 2nd defendant was not the document which had been filed by him in the former suit, and this on the ground that the original did not bear the

initials of the Munsif. This was obviously a very inconclusive ground, as the omission might have been the result of a mere accident, and certainly it was a most unsatisfactory ground to go upon when the question might have been settled beyond dispute by sending for the record of the suit which ought to have been in the Civil Judge's own record-room. We have already in more than one reported decision of this Court had occasion to point out that, what may be termed the penal provisions of Section 170, however necessary in this country to meet extreme cases, ought to be exercised with the most temperate discretion, and we think that if due forbearance and deliberation had been shown by the Lower Courts in the present case both would have recognized the impropriety of dealing with the case under Section 170. Under Section 351, we therefore reverse the decrees below and remand the suit through the Civil Court to the Court of First Instance to be heard and determined upon the merits, and this must necessarily be as to all the parties to the suit. The party who may ultimately succeed will be entitled to his costs hitherto throughout the suit and appeals.

1869. *February* 12. *S. A. No.* 309 *of* 1868.

Appellate Jurisdiction. (a)

Referred Case No. 3 *of* 1869.

SUBBUVIYAN..................................*Petitioner*.

The summary remedy under Section 53 of the Registration Act is made applicable only as between the immediate parties to the registered obligation. Such remedy cannot therefore be enforced by the representative of an obligee.

THIS was a case referred for the opinion of the High Court by Appahvya, the District Munsif of Perumbalore.

1869. *February* 15. *R. C. No.* 3 *of* 1869.

The petitioner presented a petition to the District Munsif under Section 53 of the Indian Registration Act (XX of 1866,) praying for a decree for rupees 385-12-0 due by virtue of a duly registered bond executed to his deceased undivided younger brother Aiyatorai Aiyan by the defendants. The petitioner produced a certificate under Act XXVII of 1860 authorizing him, as the uncle and guardian of the adopted minor son of the said Aiyatorai Aiyan, to collect the debts due to the estate of the latter,

(a) Present: Scotland, C. J. and Ellis, J.

1869. February 15. R. C. No. 3 of 1869.

The question raised for determination was whether the petitioner, who was not a party to the registration of the bond sued on, could be allowed summarily to recover the amount thereof under the provisions of the said Section as the representative of the deceased obligee.

The District Munsif was of opinion that the petitioner was entitled to recover, but submitted the question for the decision of the High Court.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—We are of opinion that the petitioner was not entitled to proceed under Section 53 of the Registration Act. The decision of the Court in the case reported in 3, *Madras High Court Reports*, 199, is an authority for the construction that the summary remedy under that Section is made applicable only as between the immediate parties to the registered obligation, and we see nothing in the language of the Sections 53 to 55 to warrant a distinction in favor of the representative of an obligee.

Appellate Jurisdiction. (a)

Special Appeal No. 451 *of* 1868.

N. KRISHNAMMA ....*Special Appellant.*

N. PAPA and 2 others ....*Special Respondents.*

The words "the heirs of the preceding Kurnum" in Section 7 of Regulation XXIX of 1802 mean his next of kin according to the order of succession of several grades of legal heirs and not heirs in the order of succession to undivided divisible ancestral property.

A daughter's son is one of the nearer sapindas, and in the line of heirs before a brother's son according to Hindu Law.

Semble, an illegitimate son of a Sudra by his concubine is his heir in preference to a brother's son.

1869. February 15. S. A. No. 451 of 1868.

THIS was a special appeal against the decision of P. Srinivasa Rao, the Principal Sadr Amin of Vizagapatam, in Regular Appeals Nos. 102 and 117 of 1867, reversing the decree of the Court of the District Munsif of Vizagapatam in Original Suit No. 18 of 1864.

(a) Present: Scotland, C. J. and Innes, J.

This was a suit brought for the establishment of plaintiff's right to the office of kurnum of Kupparada and Butcherazpetta, under Regulation XXIX of 1802, and to recover lands attached thereto. 1869. *February* 15. *S. A. No.* 451 *of* 1868.

The defendants pleaded that the 2nd defendant was entitled to the office of kurnum, but that the lands did not belong thereto, they having been given by the 3rd defendant to the 2nd for temporary enjoyment, and were resumable at any moment.

The District Munsif of Vizagapatam made a decree declaring the 1st plaintiff's right as well to the kurnum's office as to the lands.

The 1st and 2nd defendants appealed to the Court of the Principal Sadr Amin of Vizagapatam who dismissed the suit.

The following is extracted from the Judgment of the Principal Sadr Amin :—

The only question to be determined is who is the next heir to Ramannah the late kurnum? Of the two claimants the 1st plaintiff's position, as the son of Ramannah's deceased brother, is acknowledged on all hands, and he will therefore succeed in the absence of an intermediate heir. Is there any such heir? Is the query upon the answer to which depends the whole case and this answer in its turn depends upon the question whether the son of Ramannah's concubine (2nd defendant) is his son in the eye of the law.

All the parties in the case are Hindus,—the plaintiff's vakil states that the family in question is of the cast called "Calinga." There is no evidence to prove this; but then the vakil admits that the said cast is something other than Brahmana, Khsatraya, and Vyseya. It is clear therefore that it must be "Sudra," for there are only four casts among the Hindus. "Menu" declares, Chapter X, Section 4, that, "the Sacredotal, the Military, and the Commercial, these three are twice born classes, the Sudra the fourth is of the once born class. There "is no fifth class." I therefore hold that Ramannah was a "Sudra."

Then as to the woman kept by Ramannah, the plaintiff's vakil argues that she was not of a class in which

1869. February 15. S. A. No. 451 of 1868.

he could have married, she being a person of a class called "Reddiky" quite different from Ramannah's. But the vakil admits that the class of Reddiky is one of such divisions of the cast of Sudra. The law makes no distinction as to such sub-divisions, unless one of the parties were so degraded as to forbid all sorts of intercourse between them according to any approved custom or usage. But such is not the case here.

The law is clear on the subject. It is stated that "for a Sudra is ordained a wife of his own class and no other" (Menu, Chapter III, Section 13, and Chapter IX, Section 159), and there is no provision as to the sub-divisions whatever. The Madras High Court in Regular Appeal No. 45 of 1867 (M. H. C. R. Vol. I. 483) declared that "there being no proof of special custom or usage, the "marriage would be valid, even though the parties had been "of different sects or cast divisions of the fourth or Sudra "class," and again, the classes spoken of are the four classes recognized by Menu, and not the infinite sub-divisions of these classes introduced in the progress of time."

So then the woman was one whom Ramannah could have legally married. But he did not marry her. He kept her as a concubine and begot 2nd defendant by her. Is this illegitimate issue entitled to succeed as heir? The law on the subject is embodied in the following passages:—

"Manu," Chapter IX, Section 179, "A son begotten by a man of the servile class on his female slave, or on the female slave of his male slave, may take a share of the heritage," &c., vide also rules to the same effect as contained in Matakshara, Chapter 1, Section 12, paras. 1 and 2, Dayabhaga, Chapter IX, verse 29, Dattaka Mimansa, Section 2, verse 26, Dattaka Chandrica, Section 5, verse 30 and Yagnavulkya as contained in Colebrooke's Hindu Law Book, V, Chapter III, verses 174 and 175.

So then the son of a Sudra by a female slave inherits. But who is a slave? and whether a concubine can be classed as a slave? are questions which next arise for my solution.

The law did at first recognise seven sorts of slaves according to Menu, but the number has been since increased to fifteen by "Narada" as follows.—(Colebrooke's Digest, Book III, Chapter I, Section 1, verse 29).

(1). One born of a female slave in the house of her, master; (2) one bought; (3) one received by donation; (4) one inherited from ancestors; (5) one maintained in a famine; (6) one pledged by former master; (7) one relieved from great debt; (8) one made captive in war; (9) a slave won in a stake; (10) one who has offered himself up in this form "I am thine"; (11) one apostate from religious mendacity; (12) a slave for a stipulated time; (13) one maintained in consideration of service; (14) a slave for the sake of his bride, and (15) one self-sold. These fifteen slaves may be male or female. Of these, the woman who consented to be kept by a man, does, in my opinion, come under No. 10, *i. e.*, a slave who offers herself thus, "I am thine", and this is evident from the law classing together a female slave and an unmarried Sudra woman kept by a man thus:—

Yagnemulka Book V, Chapter III, Section 174, Commentary II, p. 321. Colebrooke's Dig. Stokes' Ed. p. 298.	The son of a Sudra by a female slave or other Sudra woman not legally married, shall share, &c.
Dayabhagha, Chapter IX, verses 29—31.	Ditto. Ditto.

Thus it is clear that no particular stress is laid on the term son of *slave* mentioned in the law. It must be taken to mean the son of a woman not legally married, *i. e.*, all illegitimate issue. In fact one of the best English authorities on the Hindu Law, Mr. Colebrooke, states "that issue by a concubine is described in the law as a son by a female slave or by a Sudra woman. If the father be Sudra, he might have allotted a share to his illegitimate son," Sir T. Strange, (II, page 68). Sir T. Strange himself in his own words states (I, p. 68-69-132) "that an illegitimate son of a Sudra is entitled to inheritance, and that an illegitimate son is the offspring of a woman not legally married to the putative father." Mr. Elberling too states the same thing (Section 160.)

1869. February 15. S. A. No. 451 of 1868.

Moreover, it must be observed that slavery has been, very fortunately, unknown in India from the time she came under the English rule, and an express enactment has been passed (Act V of 1843) declaring that no right arising out of an alleged property in the person in services of another as a slave shall be enforced by any Civil or Criminal Court or Magistrate, &c., &c. Consequently, if the rule, in Hindu Law, that the son of a slave shall inherit, meant, the son of a slave in the very literal and limited sense of the word slave, and never extended to females kept by men as their fixed concubines, the highest Judicial Courts in India would not have recognised the rights of illegitimate issue of a Sudra at all. This portion of the Hindu Law would have been set down as obsolete, and the civil rights of Sudras, like those of the three regenerate tribes, who have been confined to the issue of a man and his wedded wife, and none other. But such is not the case as I will presently prove.

In a case cited in Morley's Digest (Vol. I, p. 310), it was declared that, "among Sudras, illegitimate sons inherit to their putative father."

Another case in which a concubine's son was treated as a slave's son and held entitled to inheritance, is to be found among the notes of Sir Edward Hyde East's cases, No. XXXI in Morley's Digest II, p. 43.

The late Sadr Court of Madras recognised the right of an illegitimate son of a Sudra to inheritance in No. 652 of 1860.

The Madras High Court, in Special Appeal No. 45 of 1863, in which the contention was, that a certain party was the son of a Sudra by a concubine, declared on the authority of the Mitakshara, Chapter I, Section 12, and Sir Thomas Strange's Hindu Law, I, p. 132, that "the law has been and still is that the illegitimate children succeed their father by right of inheritance" (M. H. C. R. I, 482. Special Appeal No. 23.) Vide also High Court decision in 297 of 1864 (M. H. C. R. II 293.)

In support of the above, I may also cite the Privy Council Judgment in the case of *Chutary Run Merdun Syu v. Sabub Purlahad Syi* (Sutherland's Edition of 1867, p. 313.) With reference to that case the Honorable Mr.

Holloway observed (M. H. C. R. II 484) that "the decision of the Judicial Committee that the illegitimate son of a Kshatriya could not inherit, went precisely upon the ground that the father was one of the twice-born tribes. The whole tenor of the judgment shews that if the father had been a Sudra, the son's right would have been unquestionable."

1869. *February* 15. *S. A. No.* 451 *of* 1868.

Under these circumstances, I come to the conclusion that the son of a Sudra by a kept woman, who is also of the Sudra cast, though of a different sub-division, is entitled to inheritance under the Hindu Law, and that therefore the 2nd defendant in this case is a legal heir to the late kurnum Ramannah.

But then the right of such an illegitimate son of a Sudra is not an unqualified one. The essence of the whole law on the subject is contained in the work of Sir T. Strange's Hindu Law, wherein the author says, "Among Sudras, illegitimate continue to participate with legitimate sons, if there be any. If there be none, nor daughters, nor daughter's sons, they are distinguishable in point of inheritance from legitimate sons." (Vol I, p. 132.)

In this case it is allowed that Ramannah has left a daughter and daughter's son, besides the illegitimate son the 2nd defendant. The subject of this suit being one of inheritance to the office of kurnum, the daughter's claim becomes lapsed owing to her incapacity to perform the same (Vide decision of the Sadr Udalut in Special Appeal Nos. 85 of 1844 and 45 of 1852). There remains therefore the daughter's son and illegitimate son (2nd defendant); the selection lies between them, and either of them would exclude the 1st plaintiff in toto. Consequently, without expressing any opinion for or against the absent party, *i. e.*, the said Ramannah's daughter's son, and confirming my observations to first plaintiff and 2nd defendant, I declare it, as my decided opinion, that the selection made by the Maharajah of Vizianagrum (3rd defendant) in favor of the 2nd defendant was the most legal and justifiable one and must be upheld.

Since thus the 1st plaintiff's heirship to succeed to the office of kurnum is negatived, his claim to lands, which he

1869. February 15. S. A. No. 451 of 1868.

describes as belonging to that office, must be disallowed of course, and consequently it becomes unnecessary to enter into an investigation in this case as to whether the lands in question do really belong to the said kurnum's office, or are held by the 2nd defendant by a special temporary grant from the Maharajah of Vizianagrum.

Under all these circumstances, I reverse the decree appealed against, and dismiss the plaintiff's suit taxing him with his own and defendant's costs throughout.

Sloan, and *Kuppuramasamy Sastry,* for the special appellant, the first plaintiff.

Scharlieb, for the special respondent, the third defendant.

The Court delivered the following

JUDGMENT:—This is a suit to establish the right claimed by the plaintiff to an hereditary office of kurnum, and to recover the lands forming the mirasi maniem attached thereto. The 2nd defendant is the present holder of the office, having been appointed by the 3rd defendant under Regulation XXIX of 1802. Both the Lower Courts have found that the office is hereditary; and that the last rightful possessor, Ramanna, died undivided from his family; that he was the paternal uncle of the plaintiffs and the natural father of the 2nd defendant; and that he also left surviving him a legitimate daughter and her son, both of whom are still living. On these findings the original Court decreed that the 1st plaintiff was entitled to be appointed by the 3rd defendant to the office, and finding also that the lands claimed were appurtenant to and passed with the office, it decreed further the plaintiff's right to possession of the lands. But the Lower Appellate Court has reversed that decree and dismissed the suit without going into the question whether the lands are appurtenant to the office, on the ground that the 2nd defendant, the illegitimate son of Ramanna by the 1st defendant, his concubine, was his heir, and entitled to the office in preference to the plaintiff, Ramanna being a Sudra.

From that decision the 1st plaintiff has appealed, and the objection relied upon on his behalf is that the Hindu Law in regard to the rights of an illegitimate son of a

Sudra to inherit is strictly limited to a son by a woman in one of the conditions of slavery defined by the law. This position has been met on the part of the respondents with the argument not only that the law has a general application to all illegitimate sons of Sudras, but that assuming the law to be so limited, and the 2nd defendant not eligible, the legitimate grandson of Ramanna through his daughter is a nearer heir than his nephew, the appellant, and of right therefore entitled preferably to the office under the Regulation, and we are of opinion that this contention is well founded and fatal to the claim in the suit.

We think that the words "the heirs of the preceding kurnum" in Section 7 of Regulation XXIX of 1802, mean his next of kin according to the order of succession of the several grades of legal heirs, and not, as has been argued on behalf of the appellant, heirs in the order of succession to undivided divisible ancestral property. Now a daughter's son is clearly one of the nearer sapindas and in the line of heirs before a brother's son, and consequently if the appellant's objection is valid, the 2nd defendant is the person whom the Section makes it obligatory on the 3rd defendant to appoint, except he be incapacitated for the duties of the office, and that must be established by proof before the Judge of the Zillah, which it is not pretended has been done. The plaintiff therefore has failed to show a right as heir rendering his appointment to the office obligatory on the 3rd defendant.

It becomes unnecessary to express a decision on the appellant's objection to the 2nd defendant's right to succeed, but we may observe that our present apprehension of the authorities leads us to think that the Lower Appellate Court has taken the sound view of the law.

The decree appealed from must be affirmed, and the appellant must pay the costs of the 1st and 2nd respondents.

Appellate Jurisdiction. (a)

Criminal Petition No. 30 *of* 1869.

NARAPUREDDY, RAMAREDDY, and VAKKALA ADANNA.................. } *Prisoners.*

The severity of a sentence is not of itself a ground on which the High Court can call for the record of a trial or other judicial proceeding under the general power of revision given by Section 404 of the Code of Criminal Procedure.

1869. *February* 19. *C. P. No.* 30 *of* 1869.

THIS was a petition against an order of B. Horsburgh, the Assistant Magistrate of Cuddapah, in Case No. 27 of 1868, confirmed on appeal by the Session Court of Cuddapah.

Miller, for the prisoners.

The Court delivered the following

JUDGMENT:—The objection that the acts and conduct of the prisoners as proved do not amount to an offence is, we think, untenable.

The other objection, that the sentence is excessive, we should be inclined to give effect to if we had the power, for the circumstances in evidence do not seem to us to call for the extreme punishment provided by Section 116 of the Penal Code. But the severity of a sentence is not of itself a ground on which the Court can call for the record of a trial or other judicial proceeding under the general power of revision in Section 404 of the Code of Criminal Procedure applicable to the present petition.

(a) Present: Scotland, C. J. and Innes, J.

Appellate Jurisdiction. (a)

Referred Case No. 4 of 1869.

VENKATA SUBBA ROW *against* SESHA REDDY.

Madras Act VIII of 1865, Section 6, imposes upon village kurnums the duty of signing and registering puttahs and moochilkas exchanged under the Act. Where such puttahs and moochilkas were not signed or registered by the kurnum,

Held that a suit for rent may be maintained, founded upon the moochilka, the signature and registration by the kurnum not being intended to be a condition of the right to sue.

1869. February 22. R. C. No. 4 of 1869.

THIS was a case referred for the opinion of the High Court by Ameruddin Sheriff, the District Munsif of Proddatur.

The case stated that the plaintiff sued for the recovery of Rupees 8, being two years' rent of certain land due on a moochilka.

The document was formally drawn up in the terms required by Section 3, Madras Act VIII of 1865, but it was not signed, and was not registered by a kurnum under the provisions of Section 6 of the Act.

The Munsif was of opinion that registration by the kurnum is optional and not compulsory, but he referred for the decision of the High Court the following questions.—

I. Whether the registry and signature by the village kurnum of puttahs and moochilkas as provided for in Section 6 of Madras Act VIII of 1865 were optional or compulsory?

II. If compulsory, whether only the Collectors, when trying summary suits, or the ordinary Courts also, are prohibited from acting upon such puttahs and moochilkas not signed and not registered by kurnums.

III. If the ordinary Courts also are prohibited from acting upon such documents, what is the procedure for kurnums or parties to obtain registry and signatures when kurnums refuse to do so or when they are absent from the station, and what is the remedy now open for landholders to recover from the cultivators the rent of the years mentioned in such unregistered moochilkas.

IV. Does any appeal lie to the High Court against the orders of a Court of Small Causes declining to make a

(a) Present: Scotland, C. J. and Collett, J.

1869. February 22. R. C. No. 4 of 1869. reference under Section, 22, Act XI of 1865, and which of the two words "may" and "shall" mentioned in that Section is applicable to District Munsifs.

The Court delivered the following

JUDGMENT:—In this case we understand the fact to be that the moochilka sued on was given in exchange for a puttah as required by Sections 3 and 4 of Madras Act VIII of 1865. If that be so, we are of opinion that the suit is maintainable under Section 7 of the Act. We think that Section 6 was intended to impose upon kurnums the duty of signing and registering, but no more. Had it been intended to be a condition of the right to sue, it would have been expressly so provided in Section 7, and a provision made for compelling registration. It is not necessary to answer question 2, and question 3 is not a question which arose in the trial of the suit, and therefore ought not to have been referred.

Appellate Jurisdiction. (a)

Referred Case No. 31 *of* 1868.

KRISTNA ROW *alias* MUTTUKISTNA ROW *against* H. F. MUTTUKISTNA, ESQUIRE.

Taking it that the rule of English Law, that the relation of Counsel or Advocate and Client creates the mutual incapacity to make a binding contract of hiring and service either express or implied, governs the relation of Advocate and Client generally in this country, there must be the relation of Advocate and Client to give rise to the incapacity, and the incapacity is strictly confined to contracts relating to service as an Advocate in litigation and matters ancillary to such service.

The degree of Barrister is but one of the qualifications for admission and enrolment as an Advocate of the High Court.

Where the defendant, a Barrister who was not admitted an Advocate of the High Court, or specially authorised to plead in the Session Court, accepted a vakalutnamah from the plaintiff to defend him upon a charge pending in the Session Court, and the defendant failed to appear on the day to which the trial of the plaintiff was adjourned, and the plaintiff sued the defendant to recover the amount of the fee paid,

Held that the suit was maintainable.

1869. March 1. R. C. No. 31 of 1868. THIS was a case referred for the opinion of the High Court by J. R. Daniel, Acting Judge of the Court of Small Causes of Madura, in Suit No. 1161 of 1868.

(a) Present; Scotland C. J. and Collett, J.

The following was the case stated :— 1869. *March* 1. *R. C. No.* 31 *of* 1868.

The plaintiff sues to recover Rupees 500, being fees paid by him to the defendant to conduct his defence in a Criminal case before the Court of Session, whereas the defendant did not conduct his defence.

The defendant pleads first his privilege as a Barrister that he cannot be sued at all, and, secondly, that he appeared and was ready to conduct the defence at the Sessions to which the case was committed, but that the case was adjourned by the Court to the next Sessions, and he had therefore done all that he was bound to do.

The case was heard before me on the 10th September 1868, and a decision was given in favor of plaintiff subject to the opinion of the High Court upon the following case:

On the first point raised, I am of opinion that Mr. Mutukistna is liable to be sued. It is true that in England the employment of a Barrister is held to be honorary, and he cannot maintain an action for his fees, nor can he be sued for recovery of fees once paid to him. In all the English cases, however, the Barrister practises as a Barrister only, and I know of no case where it has been ruled that a Barrister practising also as Attorney is not liable to be sued. It is presumed from the relations of a Barrister and a Client that no contract can possibly be made between them, whereas in this case an express contract has been made, and its terms must be enforced.

The second point must be decided according to the terms of the contract between the parties. The plaintiff was committed for trial on a charge of forgery to the Session Court for the July Sessions 1867. At the end of June Mr. Mutukistna undertook to defend the case for Rupees 500 which he received.

On the first day of the Sessions Mr. Mutukistna appeared and applied to the Court to advance the case as he was going to Ceylon and the case was posted at the end of the Sessions. The Court granted the application ; but on the next day the Government Prosecutor applied for a postponement of the case for the next Sessions, and the

1869. March 1. R. C. No. 31 of 1868.

case was accordingly adjourned and intimation given by the Judge to Mr. Mutukistna by letter that the case would not be tried that Sessions.

Before the August Sessions following Mr. Mutukistna had gone to Ceylon, but he wrote a letter to Dr. Joseph who appeared, and not only applied for, but obtained, a further postponement of the case for the September Sessions.

The case was finally decided at the September Sessions. Mr. Mutukistna returned about the 11th of the month, but the case had already been disposed of, and the plaintiff had engaged another advocate to defend him.

The following are the terms of the document appointing Mr. Mutukistna :—

" I, Kistna Row *alias* Mutukistna Row, 1st accused " in Calendar No. — of 1867 on the file of the Deputy " Magistrate of Madura and Tirumunglum taluq, do hereby " nominate and appoint you H. F. Mutukistna, Esquire " Barrister-at-law, and you Mr. Thos. Morton Scott as " Counsels for my defence in said case committed for trial " to the Session Court of Madura at the next Sessions ; " and I agree to bind myself by all your acts as if they " were done by myself."

This agreement was not produced by either of the parties, but was sent for by the Court from the records of the Criminal Case ; the only evidence produced by the parties was oral—Rupees 500 was paid by plaintiff in consideration that Mr. Mutukistna should defend him in the case then committed to the Sessions, but no express stipulation was made that he should defend him at the July Sessions only. When the agreement was made, the case was fixed for that Sessions, and doubtless Mr. Mutukistna expected it would be heard then. The plaintiff says that at the time a postponement was contemplated ; he may have been aware of the intention of the Government Prosecutor to apply, but I cannot suppose that Mr. Mutukistna wished for a postponement, as he applied for the case to be advanced, and no doubt at the time it was expected that the case would be disposed of at the Sessions to

which it stood committed. Still as there was no stipulation with a view to a possible adjournment, Mr. Mutukistna was unconditionally bound to defend.

According to the terms of the written agreement, too, Mr. Mutukistna was unconditionally bound,—the words committed for trial to the next Sessions are a mere description of the case.

The adjournment was the act of the Court, but it was no more occasioned by the acts of the plaintiff than by those of Mr. Mutukistna. If Mr. Mutukistna considered himself engaged to the one Sessions only, it was clearly his duty to do all in his power to prevent a postponement. He was not present when the application was made by the Government Prosecutor. Had he been present, it would have been his duty to oppose it. He received a notice after the postponement had been made. He might have made another attempt to have the case heard that Sessions. The order of postponement might have been re-considered as it had been made on an *ex-parte* application. Mr. Mutukistna, however, acquiesced in the postponement, and did not withdraw as if he had fulfilled his engagement. The plaintiff then went to ask what was to be done about the fees if Mr. Mutukistna were not present at the next Sessions. On this occasion the plaintiff states that Mr. Mutukistna assured him that he should return in time for the case, and that if he did not he would return the fees. Mr. Mutukistna distinctly denies that he promised to return the fees, but he certainly gave the plaintiff to understand that he should return to defend his case ;—that he did intend to do so is, I think, clear from the fact of his writing to Dr. Joseph, in consequence of which a further postponement was effected. He allows that he was willing to defend the case if it had been postponed for his arrival, but this only as a matter of favor and beside the contract.

I am therefore of opinion that Mr. Mutukistna did not fulfil the terms of his contract by merely appearing at the Sessions for which the case was committed and applying for the case to be advanced. He was bound unconditionally, and the fact that the adjournment was the act of the Court does not affect the case,—it was not the

1869. March 1. R. C. No. 31 of 1868.

act of the plaintiff, and did not prevent Mr. Mutukistna from fulfilling his contract by appearing at the subsequent trial. By his absence in Ceylon he rendered himself incapable of performing his duty; and therefore the plaintiff is entitled to recover the fees for which he has received no consideration.

At the request of the defendant, Mr. Mutukistna, this decision was made subject to the opinion of the High Court. The following are the questions put by Mr. Mutukistna himself:

(1.) Can an action be maintained against a Barrister to recover a fee given to him to conduct a trial which he did not attend ?

(2.) Having regard to the terms of the vakalat, and to the fact that Mr. Mutukistna had received his brief, attended Court and urged that the case may be heard,—was he, the case being postponed on the motion of the Government prosecutor, bound to attend again at the trial? If so was he bound to do so without a refresher? If he was and did not, could an action be maintained to recover back the whole of the fees paid him or any portion and what portion ?

Mr. Mutukistna had not been enrolled as an Advocate of the High Court, and had not received a sunnud from the Civil Court.

Miller, for the defendant.

The Court delivered the following

JUDGMENT:—Confining the first question submitted strictly to the facts of this particular case, we are of opinion that the defendant was not privileged from liability to be sued for a breach of the contract evidenced by his acceptance of the vakalutnamah given by the plaintiff. The rule of the English Law in regard to the incapacity of Counsel and Client to contract as now settled by the well-considered and exhaustive judgment of the Court of Common Pleas in the case of *Kennedy* v. *Brown and wife*, 32 *Law Journal Common Plea.* 137, is that the relation of Counsel or Advocate and Client creates the mutual incapacity to make a binding contract of hiring and service either express or

implied concerning advocacy in litigation, and neither therefore incurs a legal obligation to the other in respect of such advocacy.

Now taking it that the same rule governs the relation of Advocate and Client generally in this country, we think it inapplicable to the parties in this case, the defendant not being as the case states an Advocate of this Court or specially authorized to plead in the Session Court at the time that he accepted the vakalutnamah or that the trial took place. The Roll of the Court shews that he was admitted an Advocate on the 20th of April 1868. The incapacity to incur any legal obligation is attached not simply to the degree of Barrister, but to the Barrister, who in the character and capacity of Advocate, is entitled to appear and plead on behalf of clients. There must be the relation of Advocate or Counsel and Client to give rise to the incapacity. Not only is that plainly laid down in *Kennedy* v. *Brown*, but the incapacity is strictly confined to contracts relating to service as an Advocate in litigation and matters ancillary to such service, and on that ground the Court distinguish the cases in which it had been decided that a Barrister has the capacity *quâ* Barrister to make binding contracts for his services. Referring to these cases, the Court observe:—the proposition is confined "to incapacity for contracts concerning advocacy in litigation. This class of contracts is distinguished from other "classes on account of the privileges and responsibilities "attached to such advocacy, and on this ground we consider the cases unconnected with such advocacy to be "irrelevant," and lay down as their conclusion that "on "principle as well as on authority there is good reason for "holding that the relation of Advocate and Client in litigation creates the incapacity to make a contract of hiring "as an Advocate." It follows that to be within the rule the Barrister must be entitled to appear and plead as an Advocate.

In England the degree of Barrister gives the right of advocacy, except when specially and conditionally conferred, as it has been frequently of late, for the purpose of admission to the Bar of the High Courts in India or the

1869. March 1. R. C. No. 31 of 1868.

Courts in the Colonies, in which cases it does not give the right of advocacy anywhere that we know of. Whether the defendant so obtained his degree, we are not sure, nor is it material to ascertain, for here certainly the degree though conferred unconditionally, is simply one of the qualifications for admission and enrolment as an Advocate of this Court. Before such admission and enrolment has been granted, a Barrister's position is not different from that of a member of the Faculty of Advocates in Scotland or a person possessing either of the other qualifications for admission as an Advocate, and it is as an Advocate of this Court that the right to practise throughout the Presidency under the Acts I of 1846 and XX of 1853 and the rules of Court can be claimed.

The defendant then not being an Advocate of this Court, nor specially authorized to plead in the Session Court at the time that he accepted the vakalutnamah or that the trial took place, it is obvious that the legal relation of Advocate and Client to which the incapacity is attached by the rule never existed. If, as was contended, the right to practise as an Advocate was an immaterial consideration, a Barrister who had been refused admission or suspended from practice or struck off the roll would be entitled to claim immunity from a suit under any contract which he chose to make concerning advocacy in litigation. For these reasons we are of opinion that the defendant was not exempt from liability to be sued.

With respect to the second question, as the defendant must, if present, have been allowed in the capacity of authorized agent to defend the plaintiff on the criminal charge under Section 432 of the Criminal Procedure Code, the matter to be considered is the effect of the adjournments. On the facts stated, we think the reasonable construction of the vakalutnamah is that the defendant undertook to appear for the plaintiff in the case, subject to the ordinary incidents of procedure, and that the adjournments appear to have been such incidents. The defendant's own conduct before he left for Ceylon shows that he so understood the undertaking. As to there having been no additional fee paid by way of refresher, we can only say that

the right to such a fee would require some distinct agreement, or at least settled practice to support it, and nothing of the kind is stated. Our answer, therefore, to the second question is that the suit is maintainable for the sum given for those services which the defendant failed to render in breach of the contract.

1869. *March* 1. *R. C. No.* 31 *of* 1868.

Appellate Jurisdiction. (a)

Civil Miscellaneous Special Appeal No. 182 *of* 1868.

SUBBRAMANIYA PILLAY.................*Petitioner.*

M. PERUMAL CHETTY and 69 others...*Counter Petitioners.*

A Civil Court in hearing an appeal from the decision of a Collector under Madras Act VIII of 1865 must be guided by the Civil Procedure Code, and the judgment of the Civil Court may be reviewed under Section 376 of the Code. The order granting a review is final.

Semble.—The terms of Section 57 of Act VIII of 1865 are wide enough to justify a Collector in treating as *ex-parte* a defendant not appearing on the day to which the hearing of the suit may have been adjourned under Section 66 of the Act.

THIS was a petition against an order of F. S. Child, the Civil Judge of Tinnevelly, dated the 22nd May 1868.

1869. *March* 3. *C. M. S. A. No.* 182 *of* 1868.

The plaintiff (petitioner) brought a suit under Madras Act VIII of 1865 against the counter-petitioner and eighty-two other persons to enforce the acceptance by the defendants of the puttahs tendered by the plaintiff or to eject the defendants from their holdings. The Collector decided that the defendants were bound to accept the puttahs within ten days. The Collector passed judgment *ex-parte* against the defendants under Section 57 of the Act upon the ground that they failed to file a written statement as they were required to do.

The defendants appealed to the Acting Civil Judge, who by an order dated the 31st March 1868 dismissed the appeal upon the ground that by Section 58 of (Madras) Act VIII of 1865 there could be no appeal from an *ex-parte* judgment. The Acting Civil Judge thought it was doubtful whether a Collector by terming his decision *ex-parte* could

(a) Present: Scotland, C. J. and Collett, J.

1869. March 3. C. M. S. A. No. 182 of 1868.

preclude the Appellate Court from looking into the question whether the defendants were rightly treated as *ex-parte*. He saw no reason why the defendants were not ready with answers on the day to which the hearing was adjourned, although the procedure provided by the Act required not a written answer to save an *ex-parte* judgment but an appearance only.

A petition for a review of the judgment and decree of the Appellate Court was subsequently presented to the Civil Judge. By an order dated the 22nd May 1868, the Civil Judge admitted the review and reversed the decision of the Collector. The Civil Judge was of opinion that the defendants were not *ex-parte*, for they appeared on the day fixed for the hearing, and a written statement should not have been required. The Civil Judge held further that the decree of the Collector was bad for mis-joinder.

From this order an appeal was preferred to the High Court upon the ground that the Civil Judge had no jurisdiction to make the order.

Miller and *Scharlieb,* for the petitioner.

The Court delivered the following

JUDGMENT:—This is a petition appealing from an order of the Civil Judge of Tinnevelly admitting a review of the judgment of his predecessor in a suit originally instituted before the Collector under Madras Act VIII of 1865. There is a preliminary objection to this petition which it appears to us precludes us from receiving it. The suit was instituted before the Collector under the above Act, and, rightly or wrongly, he called his decision an *ex-parte* decision. An appeal therefrom was presented by the defendants to the Civil Court, and by Section 69 of the Act "a regular appeal" does ordinarily lie from the decision of a Collector to the Civil Court of the district. In the present instance it is obvious from the judgment of the Acting Civil Judge that the appeal was treated as a regular appeal, and it was disposed of on the ground that the defendants having been *ex-parte* in the Court below, they must take the prescribed steps to set aside the *ex-parte* decision against them before they could be entitled to an appeal to the Civil Court upon

the merits. There can, we think, be no question that a Civil Court in hearing an appeal from a decision of a Collector under the above Act must be entirely guided by the Civil Procedure Code, and the judgment of the Acting Civil Judge dismissing the appeal was therefore open, just as much as a judgment in any other regular appeal would be, to review under the provisions of Section 376 of the Code, and that being so, the order granting the review is under Section 378 final, and the present petition is inadmissible. This would be sufficient for the disposal of this petition, but with a view of saving the parties the expense of another appeal, we will express our opinion upon the question, which was fully argued before us, whether the defendants were rightly treated as in default, and the decision of the Collector was, properly speaking, an *ex-parte* decision. The dictum to be found on the judgment reported in 4, *Madras H. C. R.* 56, does not apply to this case, as Madras Act VIII of 1865 lays down all the procedure to be observed in a suit before a Collector, and instead of Section 147 of the Code, there is the general provision as to adjournments contained in Section 66 of the Act, and the terms of Section 57 of the Act are wide enough to include the case of a defendant not appearing on the day to which the hearing of the suit may have been adjourned under Section 66 of the Act. In this case, according to the facts as they at present appear, the adjournment must, we think, be taken to have been made under Section 66, and that being so, we, as at present advised, incline to the view that the decision of the Collector was rightly regarded as an *ex-parte* decision under Section 57.

1869. *March* 3. *C. M. S. A.* *No.* 182 *of* 1868.

On the ground first stated this petition is dismissed.

Appellate Jurisdiction (a)

Special Appeals Nos. 387, 388, 393, *and* 394 *of* 1868.

RANGASAMY MUDELLIAR... *Special Appellant (Plaintiff.)*

SIRANGAN .... { *Special Respondent in No.* 387 *(Defendant.)*

THANDRAYA GOUNDEN...... { *Special Respondent in Nos.* 388 *and* 393 *(2nd Defendant's heir.)*

SITHAIYAN.................. { *Special Respondent in No.* 394 *(Defendant.)*

The parties to a suit appeared on the day fixed for the first hearing. On the application of the defendants' vakil, the hearing was adjourned in order to enable them to obtain certain documents from the Collector's Office and afterwards put in written statements. This they failed to do on the day to which the hearing was adjourned, and when the suit came on for final hearing they were still in default and also failed to appear in person or by vakil. A decree was given for the plaintiff.

Held, that the decree of the Original Court was not an *ex-parte* decree under Section 147 of the Code of Civil Procedure for non-appearance, but a decree under Section 148 and was therefore appealable.

1869. *February* 8. *S. A. Nos.* 387, 388, 393 & 394 *of* 1868.

THIS was a Special Appeal against the decision of C. F. Chamier, the Civil Judge of Salem, in Regular Appeals Nos. 42, 41, 43, and 40 of 1868, reversing the decrees of the Court of the District Munsif of Salem in Original Suits Nos. 325, 324, 326, and 322 of 1866, respectively.

Johnstone, for the Special Appellant in No. 387.

Rama Rao, for the Special Respondent in No. 387.

Johnstone, for the Special Appellant in No. 388.

Rama Rao, for the Special Respondent in No. 388.

Scharlieb, for the Special Appellant in No. 393.

Rama Rao, for the Special Respondent in No. 393.

Scharlieb, for *Miller*, for the Special Appellant in No. 394.

Rama Rao, for the Special Respondent in No. 394.

This was a suit, the object of which was to enforce the acceptance of a new puttah by the defendant for an enhanced rate of rent from the year 1861, on the ground

(a) Present: Scotland, C. J. and Collett, J.

that the defendant had improved his land, and to treat the excess as arrears and to enforce acceptance of another puttah for 1865.

The District Munsif, treating the defendant as *ex-parte*, gave plaintiff a decree for the amount sued for. The defendant appealed to the Civil Judge, among others, on the following grounds :—

I. The defendant had obtained two months' time from the Lower Court for the purpose of procuring copies of certain accounts connected with the measurement of the disputed lands by the Revenue authorities and which were essential to his case and then filing his written statement.

II. As he was not furnished with the abovementioned copies, he was prevented from putting in his written statement within time. The *ex-parte* judgment passed by the Lower Court during the absence of defendant's vakil on leave, without adjourning the date of hearing, is therefore unjust.

III. The defendant's application on this subject to the Lower Court has been rejected.

The Civil Judge, reversing the decree of the District Munsif, dismissed the suit with costs.

The plaintiff appealed specially to the High Court against the decree of the Civil Court upon the ground that—

The Civil Judge ought not to have admitted the defendant's appeal, inasmuch as defendant allowed the case to go *ex-parte* against him in the Court of First Instance.

The Court delivered the following

JUDGMENT:—In these cases the decrees of the Original Court in favor of the plaintiff were passed, in the absence of the defendants, on the evidence adduced by the plaintiff, and, on appeal, the Civil Court has reversed those decrees and dismissed the suits. From the decrees of the Civil Court the plaintiff has appealed, and the objection to be considered is that the decrees of the Original Court are *ex-parte* decrees to which Section 119 of the Code of Civil Procedure is applicable and therefore not open to an appeal to the Civil Court.

1869. February 8. S. A. Nos. 388, 393 & 394 of 1868.

It appears from the record that the day fixed for the first hearing of the suits was the 8th November 1866, and on that day both parties appeared by their respective vakils; but the hearing was adjourned to the 26th of January 1867 on the application of the defendants' vakils in order to give them time to obtain and peruse certain documents on record in the Collector's Office and afterwards put in the defendants' written statements. This they failed to do on the day appointed, and when the suits came on for final hearing on the 30th September 1867 they were still in default and also failed to appear in person or by vakil and decrees were passed against them.

It thus appears clearly that the defendants failed to do that for which time had been allowed them, and that the hearing of the suits had been adjourned. There was therefore such a default as is provided for in Section 148, and it has not been contested that the Original Court rightly proceeded to a decision of the suits on the record and evidence and passed decrees which were open to ordinary regular appeals, if the fact of the defendants' non-appearance either in person or by a vakil did not prevent the application of that Section. The argument on behalf of the appellant has been that when a party to a suit fails to appear on a day to which the hearing had been adjourned, Section 147 applies, whatever may have been the reason for the adjournment, and consequently the decrees must be considered as having been passed *ex-parte* for non-appearance and only open to a proceeding to set them aside under Section 119.

We are of opinion that Section 147 was not intended to have this general operation. The three Sections relating to adjournments, 146, 147, 148, must be read together and, so considered, we think the two latter Sections were meant to apply, the one to the case of a party whose only default is non-appearance after an adjournment of the hearing by the Court, and the other to the case of a party who, having obtained a special adjournment on good cause being shewn for granting him time, makes default in regard to the purpose for which the time had been allowed. Section 146 gives the power to grant time and to adjourn.

Then Section 147 provides for the case of failure to appear on adjournment and points out a mode of proceeding which is strictly applicable to non-appearance, and Section 148 provides in quite general terms that on default by a party to whom time has been allowed the Court shall proceed to a decision. There is no reason why Section 147 any more than Section 148 should apply when a party has committed both the defaults mentioned in the Sections, and it could not be given that operation without detracting from the plain language of Section 148. The Legislature could not have intended that in case of default by reason of failure to perform the act for which time had been allowed, the proceeding should be different when the party appeared from that when he did not appear. In the latter instance, the non-appearance is really but a part of the default, and it is made obligatory on the Court to proceed under Section 148 by terms which include every case of such default.

1869. *February* 8. *S. A. Nos.* 387, 388, 393 *&* 394 *of* 1868.

For these reasons we are of opinion that the decrees of the Original Court are not *ex-parte* decrees for non-appearance passed under Section 147 but are decrees under Section 148. They were therefore appealable to the Civil Court and these special appeals must be dismissed with costs.

Appellate Jurisdiction. (a)

Civil Miscellaneous Special Appeal No. 290 *of* 1868.

SUBBA VENKATARAMAIYAN...... ...*Petitioner.*

SUBBAYA AIYAN and 2 others....*Counter Petitioners.*

Where no liability to mesne profits is imposed by a decree Section 11 of Act XXIII of 1861 does not give a power to extend the relief granted by the decree in respect of the right to mesne profits, but only to determine questions regarding the amount thereof when the right thereto has been ascertained by the decree.

THIS was a petition against the order of G. Muttusami Chetti, Principal Sadr Amin of Madura, dated 20th August 1868.

1869. *February* 12. *C. M. S. A. No.* 290 *of* 1868.

(a) Present: Scotland, C. J. and Collett, J.

1869. February 12.
C. M. S. A. No. 290 of 1868.

Sanjiva Row, for the petitioner.

Sloan, for *Snell*, for the 1st counter-petitioner.

The facts appear from the following

JUDGMENT:—This is an appeal from an order of the Principal Sadr Amin's Court at Madura reversing an order passed by the Original Court in execution of the decree in the suit to enforce the delivery of possession of a piece of land and the payment of mesne profits between the date of the institution of the suit and the execution of the decree. The first ground of appeal relating to the piece of land was hardly insisted upon in argument, and it is only necessary to say that it is untenable. The second ground of appeal raises the question whether the Principal Sadr Amin has rightly decided that an adjudication in the decree of the right to the mesne profits claimed was necessary to warrant an order under Section 11 of Act XXIII of 1861.

We are of opinion that his decision is right. The suit, as appears from the plaint, was brought for the recovery of land and mesne profits for one year, but the plaintiff failing to prove his claim to mesne profits it was disallowed and the decree simply adjudged his right to the possession of the land. No liability to mesne profits therefore was imposed by the decree, and we think that Section 11 of Act XXIII of 1861 does not give a power to extend the relief granted by the decree in respect of the right to mesne profits but only to determine questions regarding the amount thereof when the right thereto has been ascertained by the decree. The general words " any mesne profits or interest " which may be payable in respect of the subject matter of " a suit between the date of the institution of the suit and " execution of the decree" following the specific terms " any " mesne profits which by the terms of the decree may have " been reserved for adjustment in the execution of the " decree" suggested at first sight a little doubt, but when the whole provision is read with the enactments in Sections 196 and 197 of Act VIII of 1859, it is clear that the words relating to mesne profits subsequent to the date of the suit must be limited strictly to mesne profits made payable by the decree in the suit.

1869. *February* 12. *C. M. S. A. No.* 290 *of* 1868.

The recovery of land and of the mesne profits thereof may be, as the Procedure Code (Section 10) shews, separate causes of action. But the plaintiff's cause of action in respect to mesne profits is at the institution of the suit limited to such as have then accrued due, and in respect to subsequently accruing mesne profits he has a fresh cause of action. Then Section 196 permits the Court to provide in its decree for the payment of such subsequently accruing mesne profits though not asked for in the plaint, but does not take away the plaintiff's cause of action in respect thereof, and if their payment is provided for in the decree then all questions regarding the amount thereof are by Section 11 of the amending Act to be determined in the course of execution. This construction is supported by two decisions of this Court in the cases of *Kuppu Aiyar* v. *Venkataramana Aiyar*, 3 *Madras H. C. R.*, 421, and *Lakshmana Naik* v. *Nanthogopal Naik* decided on the 27th July 1865 (not reported,) and also by the decision of a Divisional Court at Calcutta in the case of *Haramohini Chowdhrain* v. *Dhhmmani Chowdrain*, 1 *Bengal Law Reports*, 138.

In the latter case we find that this Court's decision in *Chennapa Nayadu* v. *Pitchi Reddi*, 1 *Madras H. C. Reports*, 453 was cited as an authority for a contrary construction of the Section, and we are led by the remarks of the Court upon it to observe that the claim in the suit was a right to depasture cattle and water them at a particular tank and to recover damages for the loss of the profits of pasturage during three years, and the decision proceeded on the ground that the intended effect of the decree passed was to make damages for the loss of the profits of pasturage from the date of the suit payable in addition to the amount awarded for the loss sustained at the institution of the suit, which effect had been given to the decree by an order in execution. Here the decree is not merely silent as to mesne profits, but the claim to those before suit has been expressly disallowed. The decision viewed in that way has been followed in *Narayana Aiyan* v. *Srinivassa Aiyan*, 2 *Madras H. C. Reports*, 435, and in *ex-parte Rudravarapu Vissam Raz*, 3 *Madras H. C. Reports*, 287, where the decree was for land and mesne profits and had in like

1869. February 12. C. M. S. A. No. 290 of 1868.

manner been given effect to by an order in execution. Perhaps a proper degree of strictness was not applied to the operation of the decrees in those cases, and we go with the observation in the judgment in the last-mentioned case that "Care is needed in drawing up decrees by Courts of "First Instance to provide for the payment of interest "or mesne profits." In every case in which the Court intends the payment of mesne profits or interest from the date of the suit, the decree should expressly so provide.

For these reasons the order appealed from must be affirmed and the appeal dismissed with costs.

Appellate Jurisdiction (a)

Civil Miscellaneous Regular Appeal No. 272 of 1868.

RAMANUJA AIYANGAR..................*Petitioner*.

VENKATA CHARRY ....*Counter Petitioner*.

The period of limitation provided by Section 20 of Act XIV of 1859 runs not from the date of a former application for process of execution to enforce the decree, but from the date of the order upon the application.

An application to enforce the execution of a decree was made on the 30th August 1865. The application was dismissed by an order of the Court dated the 14th October 1865. The second application was made on the 6th October 1868.

Held, that the second application was not barred by the Limitation Act.

1869. March 10. C. M. R. A. No. 272 of 1868.

APPEAL from the order of E. B. Foord, the Civil Judge of Chingleput, dated the 13th October 1868.

Srinivassa Charyar, for the petitioner.

Sunjiva Row, for the counter-petitioner.

The material facts and dates are set forth in the following

JUDGMENT:—This is an appeal from an order dismissing the plaintiff's application for process of execution to enforce the decree in the suit, on the ground that Section 20 of Act XIV of 1859 was a bar to the issuing of such process. The undisputed facts are that the present application was made on the 6th October 1868, and that a previous similar application had been made on the 30th

(a.) Present: Scotland, C. J. and Collett J.

August 1865 which the Court dismissed by an order dated the 14th October 1865. Consequently more than three years had elapsed between the dates of the applications but not from the date of the former order, and the question is whether the period of limitation under Section 20 ran from the date of the former application, as the Civil Court has held, or from the date of the order dismissing it, and we think clearly from the latter date.

1869.
March 10.
C. M. R. A.
No. 272 *of*
1868.

The Section requires that some proceeding shall have been taken to enforce the decree or keep it in force within three years preceding the application, and so long as the former application remained on the file of the Court for consideration and determination it was a proceeding *de die in diem* to enforce the decree. Until the order of the Court disposing of it had been made a fresh application for the same purpose would not have been permissible. The application therefore was within the period of limitation, and the order appealed from must be reversed with costs.

Appellate Jurisdiction. (*a*)

Civil Miscellaneous Special Appeal No. 18 *of* 1869.

T. V. Ragava Pishardi........................ *Petitioner.*

Ayumanjiri Mankal Thupan *alias* Valia Thambrakle.................. } *Counter-Petitioner.*

A decree-holder applied for the sale of certain property then under attachment in the suit. The Court refused to issue process for the sale on the ground that the property could not be sold as certain claims and suits respecting it were still pending. The claims and suits having been determined the application was renewed. More than three years had elapsed between the date of the order on the first application and the date of the renewed application.

Held, that the second application was not barred, the order upon the first application operating simply as a temporary stay of process for the sale of the property and there was a pending proceeding to enforce the decree during the stay.

APPEAL against the order of J. C. Hannyngton, the Acting Civil Judge of Calicut, dated the 23rd October. 1868.

1869.
March 10.
C. M. S. A.
No. 18 *of*
1869.

The petitioner (the decree-holder) applied to the Court of the Principal Sadr Amin of Calicut praying, that the

(*a*) Present; Scotland, C. J., and Collett, J.

1869. March 10. C. M. S. A. No. 18 of 1869.

amount of the decree and interest in Suit No. 161 of 1861 might be recovered by sale of the defendants' property under attachment, and the balance from the defendants themselves.

The Principal Sadr Amin made an order directing a warrant of execution to issue as prayed.

The judgment-debtors appealed to the Civil Court, alleging that the application for execution was barred by the Limitation Act.

The Civil Judge found that a period of three years and ten months had elapsed between the first application for execution of the decree and the present application; but the first application was rejected because, though the property was under attachment at the instance of the petitioner, the attachment was removed in consequence of certain claims made and certain suits pending respecting the property. The petitioner waited until these claims were decided, and the Civil Judge held that under the circumstances the applicant was not barred.

The judgment-creditor appealed, relying on the Act of Limitation.

Johnstone, for *Green*, for the petitioner.

Karunagara Menon, for the counter-petitioner.

The Court delivered the following

JUDGMENT.—The question in this case is whether the plaintiff's right to process of execution is barred by Section 20 of the Act of Limitation, an interval of more than three years from the date of an order on a previous application having elapsed when the present application was made. The previous application was for the sale of the property of the judgment debtor then under attachment in the suit, and the order shows that the Court refused to issue process for the sale on the ground that the property could not be sold, as certain claims and suits respecting it were still pending. From the date of the order the property has continued under the attachment, and on the claims and suits being determined the application for a sale was renewed.

On these grounds the Civil Court was clearly right in holding that the application was not barred. The order

operated simply as a temporary stay of process for the sale of the property, and there was therefore a pending proceeding to enforce the decree throughout the period of the stay. The appeal will be dismissed with costs. 1869. March 10. C. M. S. A. No. 18 of 1869.

Appellate Jurisdiction (a)

Special Appeal No. 342 *of* 1868.

RAMANADA BUTT.................*Special Appellant.*

BITHEE and another..............*Special Respondents.*

The plaintiff sued to obtain a decree declaring that the ancestral land possessed by the family of the plaintiff was not liable to seizure and sale in satisfaction of an *ex-parte* decree obtained by the defendant in a suit against the yejamau of the plaintiff's family on the ground that the decree had been obtained collusively and fraudulently for a debt alleged to have been contracted for the benefit of the family.

The decree against the yejaman was passed on the 22nd June 1857, and upon attachment of the family property the plaintiffs made a claim under Section 246 of the Civil Procedure Code, alleging their independent right to the property and resisting a sale. The claim was disallowed on the 18th October 1861, and an appeal from that decision was dismissed on the 15th November 1861. The present suit was instituted on the 2nd February 1864.

Held, that this was not a suit to which the limitation provided by Section 246 of the Civil Code or by Clause 5 Section 1 of Act XIV of 1859 was applicable, and that the suit was not barred.

THIS was Special Appeal against the decision of Srinivassa Row, the Principal Sadr Amin of Mangalore, in Regular Appeal No. 325 of 1866, confirming the decree of Court of the District Munsif of Mulki in Original Suit No. 15 of 1864. 1869. March 31. S. A. No. 342 of 1868.

Srinivasa Chariyar, for the special appellant (the defendant.)

Kurunagara Menon, for *Parthasarathy Iyengar*, for the special respondents (the plaintiffs.)

The facts are sufficiently set forth in the following

JUDGMENT:—The plaintiffs in this case are members of a family subject to the Aliyasantana law, and the suit has been brought to obtain a decree declaring the ancestral land possessed by the family not to be liable to seizure and sale in satisfaction of an *ex-parte* decree obtained

(a) Present: Scotland, C. J, and Collett, J.

1869. March 31. S. A. No. 342 of 1868.

by the defendant in a suit by him against Boda Pujari as the yejaman of the family, on the ground that such decree had been obtained collusively and fraudulently for a debt falsely alleged to have been contracted for the benefit of the family. Both the Lower Courts have decided that the decree was so obtained and have granted the relief prayed, and their decisions on that point cannot be questioned.

The ground of appeal now relied upon by the defendant is that the suit, not having been commenced within one year from the date of the order passed on the claim of the plaintiffs under Section 246 of the Code of Civil Procedure, was barred by that Section and by Clause 5 Section 1 of the Act of Limitation. The record shews that the *ex-parte* decree against Boda Pujari was passed on the 22nd of June 1857 on his promise in writing to pay the amount due by him to the plaintiff in the suit (the now defendant,) and that after the death of Boda Pujari the property in question was attached in execution, and the plaintiffs thereupon put in a claim under Section 246 of the Code alleging their independent right to it and resisting a sale; that on the 18th October 1861 the Original Court made an order disallowing the claim; that an appeal therefrom to the Civil Court was dismissed on the 15th November 1861, and the present suit instituted on the 2nd of February 1864.

The question to be determined is whether this is a suit to which either Section 246 of the Code or Clause 5 Section 1 of the Act of Limitation is applicable, and we are of opinion that it is not. The enactment in Section 246 empowers the Court executing the decree to determine summarily whether at the time of the attachment the property claimed was or was not in the possession of the judgment-debtor as his own property, or of some one in trust for him, or in the occupancy of persons paying rent to him and thereupon to pass an order, and the limitation of one year is allowed to "the party against whom "the order may be given to bring a suit to establish his "right." The suit meant is clearly, we think, a suit to try any claim of proprietary or possessary right cognizable under the Section, which, if successful, would entitle the claimant to an order releasing the property from attach-

1869. March 31. S. A. No. 342 of 1868.

ment, and the specific terms of the Section relating to the questions of right for determination obviously exclude the cognizance of an objection to the validity of the decree.

Now the present suit was brought not to establish such a right but to invalidate the decree. The plaint implies the liability of the property for the debt, if the decree be valid, and, charging that the decree had been obtained by collusion and fraud, asks that it may be cancelled on that ground, and as a consequence the property declared not liable to be sold under the order dismissing the plaintiff's claim, and this is the relief decreed by the Lower Courts. The claim in the suit then not being cognizable under Section 246, we think the period of limitation therein prescribed is not applicable.

With respect to Clause 5 Section 1 of the Act of Limitation, we are of opinion that the enactment relates to suits to set aside or alter summary orders on some ground affecting the jurisdiction of the Court or the soundness of the decision on which the order is founded, and, for the reasons already expressed, we think the present is not such a suit but one brought to get rid of the decree on a ground not open on the summary determination of the former claim, and consequently that the limitation in the clause is equally inapplicable.

It becomes unnecessary to decide the point taken on behalf of the respondent that the case was excluded from the operation of Section 246 of the Code by the provision in Section 387, but our opinion is against it. The provision in Section 387 saves to every party to a suit pending, at the time when the Code came into operation, the rights of procedure whether of appeal or otherwisewhich but for the passing of the Code would have belonged to him. Here the plaintiffs were not parties to a pending suit when the Code came into operation. The suit was against Boda Pujari alone on his personal contract and had been determined by a decree before the Code became law, and the plaintiffs came in as claimants under Section 246.

The appellant's objection failing, the decree of the Lower Appellate Court must be affirmed and the appeal dismissed with costs.

Appellate Jurisdiction (a)

Special Appeal No. 395 *of* 1868.

RAMASAWMY MUDALI..........*Special Appellant.*

VALAYUDA MUDALI *alias* AIYATHORAY MUDALI... } *Special Respondent.*

In a suit to recover from the defendant the amount of purchase money paid by the plaintiff upon a sale to him of certain land by the defendant's father and the costs incurred by the plaintiff in defending his title to the property against a prior purchaser for the same land from the defendant's father.

Held, that the period of limitation was six years.

Held also, that the cause of action arose on the discovery of the fraud upon the plaintiff and that there was knowledge of the fraud at all events in October 1859, the date of the judgment of the Civil Court affirming the title of the prior purchaser, notwithstanding the presentation of an appeal from that decision, and notwithstanding that the plaintiff remained in possession of the land until 1861,

The present suit, having been brought more than six years after the judgment of the Civil Court, was held to be barred.

1869. *March* 31. *S. A. No.* 395 *of* 1868.

THIS was a Special Appeal against the decision of E. F. Eliott, the Acting Civil Judge of Tranquebar, in Regular Appeal No. 297 of 1869, reversing the decree of the Court of the Principal Sadr Amin of Tranquebar in Original Suit No. 75 of 1865.

Sanjiva Row, for the special appellant, the defendant.

Snell, for the special respondent, the plaintiff.

The suit was brought for the recovery of rupees 6,318-12-11, being the amount of a deed of sale, as well as the costs of suit incurred by the plaintiff.

The plaint stated that the defendant's late father received from the plaintiff rupees 2,500, the value of 14 valies, 8 maws and 52¼ gulies of nunjah, punjah lands, &c, belonging to him, and sold them to him by virtue of a deed of sale dated the 30th July 1856; that, nevertheless, one Sevarama Sastry fabricated a bill of sale as if the same lands had been sold to him by the defendant's father on a previous date, and instituted the Suit No. 44 of 1856 on the file of the late Mahomedan Sadr Amin of Combaconum against him (plaintiff) and the defendant's father, and notwithstanding

(a) Present: Scotland, C. J. and Collett J.

the latter's admission of both the sales, the Appellate Court gave preference to the sale to Sevarama Sastry in its decision in Appeal Suit No. 644 of 1857, and this decision was upheld by the late Sadr Court in Special Appeal Suit No. 33 of 1860 on the 15th December of the same year, and that he (plaintiff) is reasonably entitled to the purchase money as well as the costs incurred by him in those suits, the fraudulent acts of the defendant's father having deprived him of the lands.

Defendant, in his answer, relied upon the Statute of Limitation and denied the plaintiff's right to recover upon other grounds.

The Principal Sadr Amin dismissed the suit. Upon the question of limitation his finding was as follows:—

It is seen by the decree (C) of the late Sadr Court that the former suit, in which the plaintiff had specially appealed, was finally decided by them on the 15th December 1860, or five years previous to the date of this action, namely, the 16th December 1865, and by the execution records therewith connected, that he was not dispossessed of the lands alleged to have been sold to him, until the latter end of the year 1861,—therefore the action based upon the bill of sale A which in my opinion falls under Clause 16, Section 1, Act XIV of 1859, by which six years are allowed, is not affected by the Statute of Limitation.

The plaintiff appealed, and the Civil Judge, reversing the decision of the Principal Sadr Amin, decreed for the plaintiff for the amount sued for. He held that the suit was not barred because the date of the cause of action was the appeal decision of the late Sadr Court, exhibit C, dated 15th December 1860.

The defendant appealed specially to the High Court upon the ground that the suit was barred by the Statute of Limitation.

The Court delivered the following

JUDGMENT:—This is a suit to recover rupees 2,500, being the price paid to the defendant's father on the execution of a deed of sale by him of certain family land

1869. March 31. S. A. No. 395 of 1869.

together with interest and an amount of costs incurred in defending the plaintiff's right as purchaser. The Civil Court, reversing the decree of the Principal Sadr Amin's Court, has decreed to the plaintiff the amount claimed; and the grounds of appeal relied upon are that the suit was barred by the Act of Limitations, but if not, that the plaintiff is not entitled to recover either the interest on the purchase money or the costs claimed.

The material facts, according to the findings of the Civil Court, are that the plaintiff become *bona-fide* the purchaser of the land in 1856 and paid the purchase money and was at once put in possession by the defendant. Very soon after, a suit (No. 44 of 1856) to eject the plaintiff was brought in the Principal Sadr Amin's Court of Combaconum by Sevarama Sastry claiming under an instrument of sale executed by the defendant's father prior to the date of the sale to the plaintiff. In that suit the defence of the plaintiff was that the property had been sold and transferred to him, and the consideration paid 10 or 15 days before the execution of the deed of sale to Sevarama, but the defendant's father, who was also a defendant, pleaded that the sale to Sevarama had become ineffectual by reason of non-payment of the consideration money in full, that the property had been subsequently sold to the present plaintiff and he too had made default in payment of a portion of the consideration money whereby the sale had been invalidated. The decree in the suit was adverse to the plaintiff Sevarama in the Court of First Instance, but on appeal to the Civil Court that decree was reversed and a decree passed on the 11th October 1859 adjudging his right as vendee to the possession of the land, which was affirmed on the 15th December 1860 by the late Sudr Court. The plaintiff remained in possession of the property during the litigation and was not ejected by process of execution until late in 1861, and on the 16th December 1865 he instituted the present suit.

With respect to the bar of the suit two points have been raised for consideration, first, the period of limitation applicable to the suit, second, the time at which the cause of action arose. On the first point it has been argued for

1869. March 31. S. A. No. 395 of 1868.

the appellant that the defendant's sole liability was for a breach of the contract of sale, and consequently that the period of limitation was three years under Clause 9, Section 1 of the Act of Limitation. But that argument, we think, is not maintainable. There are terms in the deed of sale which amount perhaps to a contract for the quiet enjoyment of the property under it, and it may be that the law implied a warranty on the part of the defendant that he had the title which he professed to sell, and that a suit would have lain for the breach of one or other contract. But we give no opinion as to either liability, and will only add that the question of an implied warranty in such a case is a doubtful one, requiring a careful consideration of the different rules of English Law applicable to sales of realty and personalty.

Assuming a breach of contract for which the plaintiff might have sued, that was clearly not his sole cause of action. The concealment and deception practised by the defendant on the execution of the deed purporting to transfer the title to the property amounted to legal and moral fraud which was of itself a ground of suit for the recovery back of the purchase money paid, and the record shews that the suit was brought and has been determined on that ground. It follows that the period of limitation applicable to the case is six years under Clause 16, Section 1 of the Limitation Act.

Then as to the second point on which the question of the bar depends. Section 10 of the Act provides that in cases founded on fraud "the cause of action shall be "deemed to have first arisen at the time at which such "fraud shall have been first known by the party aggrieved." Now the record certainly does not enable the Court to decide that the plaintiff's knowledge or means of knowledge before the judgment of the Civil Court in 1859 warranted more than a belief that there had been a transaction of sale with Sevarama which had come to nought, and that the property in consequence had been left in the enjoyment of the defendant, nor is any further inquiry in that respect necessary. Undoubtedly the judgment

1869. March 31. S. A. No. 395 of 1868.

and decree of the Civil Court made known to the plaintiff in the most decided manner the fraud on which the suit is based, and more than six years from the date of that decree had elapsed when this suit was instituted. The period of limitation began to run at all events upon the passing of that decree, and no provision of the law warrants the exclusion of any portion of the subsequent time during which the plaintiff was permitted to hold possession of the property. The appeal from the decree was a voluntary proceeding taken at the plaintiff's own risk. For these reasons we are of opinion that the suit was barred by Clause 16, Section 1, of the Act of Limitation.

The decree of the Civil Court must therefore be reversed and the suit dismissed. The defendant's costs in this and the Lower Courts must be paid by the plaintiff.

Appellate Jurisdiction. (a)

Regular Appeal No. 51 *of* 1868.

N. CHANDVASEKHARUDU, and another... *Appellants.*

N. BRAMHANNA, being a minor, his father CHINNA JAGANNADHAM... } *Respondent.*

A widower can make a valid adoption according to Hindu Law.

Semble, the Hindu Law does not prohibit an adoption by a man who has not been married.

1869. March 31. R. A. No. 51 of 1868.

THIS was a Regular Appeal against the decree of E. B. Foord, the Civil Judge of Berhampore, in Original Suit No. 24 of 1867.

Sloan, for *Snell*, for the appellants (the 1st and 2nd defendants.)

Sanjiva Row, for the respondent (the plaintiff.)

The facts appear in the following

JUDGMENT:—This is an appeal from the decree of the Civil Court of Berhampore adjudging the right of the plaintiff as an adopted son to recover from the 1st and 2nd defendants possession of a portion of the land claimed in

(a) Present: Scotland, C. J., and Collett, J.

1869. *March* 31. *R. A. No.* 51 *of* 1868.

the plaint together with an amount on account of mesne profits. The grounds of objection relied upon on the part of the appellant are that the evidence is insufficient to prove that the alleged adoption of the plaintiff had taken place, but, if sufficient, then that the adoption was of no legal validity, as the adoptive father had no wife living at the time it took place. With respect to the effect of the evidence, we think the Civil Court has come to a right conclusion.

The second ground of objection has been held by the Civil Court not to be maintainable on the authority of the decision of this Court in the case of *Nagapa Udapa* v. *Subba Sastry,* (2 *Madras High Court Reports,* 367) which is in point. But it has been pressed upon us on behalf of the appellant that the decision rests on the 4th note of Mr. Sutherland to his *Synopsis of the Hindu Law of Adoption* in which he does not profess to lay down what the law is on the point of adoption by an unmarried man or widower, and that its soundness is questionable, and we have been induced to look into the works of authority referred to in order to see whether any doubt appeared which would be a ground for the reconsideration of the point by the full Court.

It is true that, in the note relied upon in the judgment, Mr. Sutherland does not express his decided opinion, but he states clearly that in his view the ancient texts on which the right of adoption is founded do not warrant the prohibition of an adoption by a man who may not have "married, or still less one whose wife may have died," and his view of the interpretation of the law of adoption is of the highest authority. But the decision does not rest on this note singly. Jagganada's commentary in *Book* 5 *Chapter* 4, *Section* 8 *of the Digest,* which is referred to both in the judgment and Mr. Sutherland's note, declares that no law is to be found which supports the contentions that "one who has no wife being consequently excluded from "the order of a householder cannot properly adopt a son." A passage is also cited in the judgment from Sir William Macnaughten's *Principles of Hindu Law,* page 66, where he adopts Mr. Sutherland's view, and in support of it refers

1869. March 31. R. A. No. 51 of 1868.

to an opinion of Pundits in favor of the validity of an adoption by person not a "Grihi," that is an unmarried man, and adds "there is certainly no authority against it." In the other passage cited from Sir Thomas Strange's Treatise to the same effect, the learned author adopts the view of Mr. Sutherland.

These authorities are strong to shew that the position they lay down is the sound view of the law unless they are at variance, as has been argued, with the true construction of the primary texts relating to the right of adoption when considered with the policy of the law in regard to marriage. It has been urged that the texts of *Manu* and *Atri* in the *Dattaka Mimansa, Section* 1, *Clause* 39, and *The Dattaka Chandrika, Section* 1, *Clause* 3, declaring that adoption must be made "by a man destitute of male "issue" together with the text of *Caunaka* which follows expressing more fully that it must by "one desti- "tute of a son or one whose son may have died having "fasted for male issue" import that the right of adoption belongs only to the man who has capacitated himself by marriage to procreate a son and also has a wife alive. To this construction all the three texts as respects the condition in marriage are open, and the same may be said of the text of *Caunaka* as respects the condition of an existing wife, but they do not necessitate either construction. Their obvious purpose was to enjoin the need of a son by adoption to every man without male issue "for "the sake of the funeral cake, water and solemn rites "and for the celebrity of his name" and while the language "a man destitute of male issue," or as the explanatory comment in *The Dattaka Chandrika* expresses it, "one to "whom no son may have been born," is applicable to a man who has not been married, a strict compliance with that added by Cannaka "or one whose son may have died "having fasted for male issue" is quite compatible with an adoption by a man who at the time has not a wife living. A sonless widower may have rigidly fasted for a son before his wife's death, and for aught that appears the plaintiff's adoptive father may have earnestly practised such self-denial. Considering the essential importance which attached to the state of marriage throughout the whole system

of Hindu Law, it is in the highest degree probable that the injunction in the texts was specially addressed to the order of "Grihi" or married men, but that is not a reason for straining the language used into prohibitions by implication of adoptions by widowers and celibates. It might have been so if celibacy, instead of being merely discouraged by the law, had been a temporal offence, or marriages had been imposed on adults as an enforceable legal obligation. But neither is the case, and as respects the need of the spiritual benefits attributed to the performance of obsequial rites by an adopted son, there appears to us to be no sound distinction between the single married man or the widower and the man whose wife is alive. We can discover no authority for the positions laid down by Mr. Strange in his *Manual of Hindu Law, Chapter* 3, *Sections* 60, 61, that unmarried males of whatsoever age are not in danger of "put" and hence no adoption on their account is necessary, and that adoption by a widower is not valid. According to our understanding of the Hindu system of law, it is inculcated as a fundamental precept that every man is in peril of "put" but may obtain deliverance from it through the birth or adoption of a son and the efficacy of his performance of the prescribed exequial rites. *Strange's Hindu Law,* 73, 74. Obviously, however, the ground stated is inapplicable to the position that a widower cannot adopt, and the only work cited in support of it is so far as we can ascertain unknown here.

We were referred to the *Mitacshara, Chapter* 2, *Section* 1, *Clause* 11, and *Manu, Chapter* 9, *V.* 45 *and* 106, as shewing that adoption is but the means provided of substituting a son on failure of male issue of a marriage, but the texts referred to do not carry the case any further than the authorities already observed upon. The law no doubt is that a son by adoption takes the place of a legitimate natural son, but nowhere do we find that a wife and failure to procreate a son are made indispensable conditions of the right to adopt. Apparently the only text having any strong bearing to that effect is that of Medhatiyi wherein it is stated with reference to a passage in *Manu, Chapter,* 9, *V.* 180, to be a peremptory precept that offspring should be produced by the house-holder, and

1869. March 31. R. A. No. 51 of 1868.

should a legitimate son not be acquired a son by adoption may be resorted to. But the text is combated in Section I of the *Dattaka Mimansa*, and although the reasoning upon it is in part very obscure, the conclusion arrived at is thus stated in Clause 62 " the precept to produce a son " cannot be inferred, but on the contrary funeral rites alone " must be understood on account of unity of import with " the text of Atri which expresses for the sake of the " funeral cake, water, and solemn rites." Further it is of this very text of Medhatityi that Mr. Sutherland has observed in the note before referred to that it " may be " regarded as merely enjoining the more obligatory neces- " sity for a married man having no male issue to adopt a " son" and a wider meaning the other authoritative texts do not it seems to us warrant.

On this view of the authorities, no effect can be given to the argument based on the moral ground of its being the policy of the law to encourage marriages. It is not of itself an admissible ground for invalidating the adoption, but, if it were, we should consider it unavailing, for it strikes us as very improbable that any unmarried Hindu would be induced by the knowledge of his ability to adopt a son to avoid marriage. The innate desire of every Hindu man to marry and have issue of his body is proved by experience to be too strong to admit of such a belief. The only probable effect of making the existence of a wife a necessary condition of adoption would be to coerce marriages in cases in which from age or other natural cause it was physically certain that issue could not be procreated.

For these reasons we concur in the decision of this Court that a widower can make a valid adoption, and for the same reasons we entertain a strong opinion that the law does not prohibit an adoption by a man who has not been married. The decree of the Civil Court will be affirmed with costs.

Appellate Jurisdiction. (a)

Civil Miscellaneous Regular Appeal No. 41 *of* 1869.

LAKSHMI AMMAL.........................*Petitioner.*

SASHADRY AIYANGAR and 5 others...*Counter Petitioners.*

Process of execution cannot always be issued for three years' arrears under a decree directing annual payments of money for a series of years.

The petitioner, who had obtained a decree for an annual sum for maintenance during her life, alleged satisfaction of the decree up to a period less than three years from the date of the application for execution of the decree. The Judge was not satisfied of the alleged satisfaction and dismissed the application for execution.

Held, that the petitioner was entitled to execution of the decree at any time from the date at which the first instalment became due, but that she was not entitled to have process of execution issued within three years from the date at which the second instalment or subsequent instalments became due.

Case remitted for inquiry as to the allegation of the petitioner of the receipt of maintenance in satisfaction of the decree within three years from the date of the application for execution.

1869. *April* 1. *C. M. R. A. No.* 41 *of* 1869.

THIS was a petition against the order of E. F. Eliott, the Acting Civil Judge of Chittoor, dated 14th October 1868.

The petition, dated the 5th October 1868, set forth that the plaintiff obtained a decree on the 6th February 1850 against the execution-debtors allowing petitioner rupees 24 for life for maintenance; that maintenance due up to the end of October 1865 was made good by the defendants and praying for process of execution to recover maintenancefor three years from November 1865 to the end of October 1868.

The order of the Civil Judge, dated the 14th October 1868, stated that beyond the bare statement of the applicant that she received the maintenance up to the end of October 1865, there was nothing on the records of the Court to show that the applicant kept alive the decree within three years preceding the application. The application was therefore rejected.

The petitioner appealed to the High Court for the following reasons:—

(a) Present: Bittleston and Innes, J. J.

1869. April 1. C. M. R. A. No 41 of 1869.

1. The Civil Judge ought to have allowed the petitioner an opportunity to prove her statement of payment of maintenance up to November 1865.

2. The decree being a decree for maintenance for life, the petitioner could execute it whenever maintenance was withheld from her.

Srinivassa Chariyar, for the petitioner, the counter petitioners not appearing in person or by Counsel.

The Court delivered the following

JUDGMENT:—In 1850 the petitioner obtained a decree for payment to her of 24 rupees annually for her maintenance during her life. She alleges that she has been paid or satisfied to the end of October 1865; and on the 5th October 1868 she applies for execution, but the Civil Judge has rejected that application on the ground that it is barred by the 20th Section of Act XIV of 1859.

In Referred Case 35 of 1868, it was held by this Court that the period of three years mentioned in Section 20 must be reckoned from the time when the decree became enforceable by process of execution, and, concurring entirely in that decision, we have only to consider how far it is applicable to the present case. Now this decree became enforceable when the first annual instalment fell due, so far as that instalment was concerned, and at any time within three years from that date process of execution might be issued to enforce the payment. But supposing no step to be taken at that time to enforce the decree or keep it alive, could the judgment-creditor obtain process of execution to enforce payment of the second instalment only within three years from the date when the second instalment fell due?

In other words can process of execution always be issued for three years' arrears under a decree directing annual payments of money for a series of years? Upon the whole we consider that that question must be answered in the negative. The principle on which enactments of this kind rests is that if a person sleeps upon his rights for a length of time, a presumption arises that the claim has been in

some way satisfied; and if a person entitled to receive a sum of money annually for life neglects to enforce the decree for many years the presumption arises as strongly as if the decree had been for payment of one single sum at one time, and the ground for the interposition of a law of limitation is the same. The words of Section 20 would clearly include such a case, and we think the spirit of the provision, as explained in the decision above referred to, as well as the letter, applies.

1869. *April* 1. *C. M. R. A. No.* 14 *of* 1869.

The petitioner, however, alleges satisfaction of the decree down to the end of October 1865, and that allegation is, we think, sufficient to get rid of any difficulty under Section 206 of Act VIII of 1859; and if the decree was satisfied to the end of October 1865, then it was not enforceable by execution until after that day, and the present application is not barred by lapse of time.

We must therefore reverse the decision of the Civil Judge, and direct him to hear the application after notice to the defendants; for it seems to us that the defendants ought to have the opportunity of answering the allegation that the decree has been satisfied to the end of October 1865, and of showing any other cause why the decree ought not now to be executed as regards three years' arrears.

Appellate Jurisdiction (a)

Civil Miscellaneous Regular Appeal No. 178 *of* 1868.

MAHOMED ABDUL VAKAB SAHIB.........*Appellant.*

COMANDUR RAMASAMY AIYANGAR....... *Respondent.*

The stipend of a Carnatic Stipendiary is not liable to attachment in execution of a decree obtained against the Stipendiary, it being one of the description of personal grants expressly protected from attachment in satisfaction of any decree or order of a Court by Section 3, Regulation IV of 1831, extended by Act XXIII of 1838.

These enactments are not impliedly repealed by Sections 205 and 237 of the Code of Civil Procedure.

APPEAL against the orders of W. S. Whiteside, the Acting Civil Judge of Chingleput, dated 15th February and 13th March 1868.

1869. *April* 2. *C. M. R. A. No.* 178 *of* 1868.

(a) Present: Scotland, C. J., and Collett, J.

1869. April 2. C. M. R. A. No. 178 of 1868.

Mahomed Yakab Sahib, the petitioner, who was in the Civil Jail of Chingleput in execution of the decree in Original Suit No. 46 of 1867 on the file of the High Court of Madras, applied to the Civil Court praying to be discharged from Jail. The judgment creditor, Ramasawmy Aiyangar, the plaintiff in the above suit, opposed the application of the petitioner unless he complied with certain terms submitted by the judgment creditor.

The Acting Civil Judge of Chingleput, finding that the petitioner was in possession of a Carnatic pension of rupees 53 per mensem, made an order directing the Collector to forward to the Court the sum of money in deposit in his treasury on account of the arrears of pension payable to the petitioner. The amout would be paid to the judgment creditor in part satisfaction of his claim. The Collector was further directed to forward every month to the Court the amount of the pension out of which Rs. 38 would be paid to the judgment creditor and Rupees 15 to the petitioner for his maintenance. The petitioner would be detained in custody until the arrears of pension had been received from the Collector's Office when he would be set at liberty.

The petitioner appealed upon the grounds that Carnatic Stipends were not liable to attachment by process of the Civil Court, and that the Civil Court had no jurisdiction to pass the order made.

The Advocate General, for the appellant.

Vencatapathy Row, for the respondent.

The Court delivered the following

JUDGMENT:—This is an appeal from an order made in execution of a decree obtained by the respondent against the appellant for Rupees 3,159-12-0 with interest at 6 per-cent from date of decree till payment.

It appears that the appellant, having been in jail under process of execution for six months, petitioned the Civil Court for release from further imprisonment on the ground that he possessed no property or means except a monthly allowance of Rs. 53 which had been granted to

1869. April 2. C. M. R. A. No. 178 of 1868.

him as one of the Carnatic Stipendiaries by the Government and was then in arrear for several months: and thereupon the Court, after examining the petitioner, made the order. The question to be determined is whether the order is invalid either wholly or in part by reason of the allowance not being liable to process of execution in satisfaction of the decree.

It is one of the numerous pecuniary provisions enjoyed from the Government by the descendants of members of the family of Azeem Oo-Dowlah, the Nabob of the Carnatic, in 1801, and all these provisions originated, (as we learn, from Mr. Balfour's compilation of the orders of the Government relating to Carnatic Stipendiaries) in personal grants made by the Government in accordance with a Minute of Lord Clive drawn up in 1801 under the treaty of that year, absolutely vesting the Government and revenues of the territories of the Carnatic in the East India Company. The original grants were considered as made only for life, and rules subsequently laid down by the Government provide for reductions of their amount on the deaths of the original grantees and for distributive grants of the reduced amounts in certain proportions amongst surviving members of their families, and under one of these distributive grants the allowance in question is payable to the defendant.

It thus appears to be a State stipend or pension granted to the defendant personally by the favour of the Government, and one of the descriptions of personal grants expressly protected from "attachment in satisfaction of "any decree or order of Court" by Section 3 of Regulation 4 of 1831 as extended by the provision in Act XXIII of 1838. If therefore these provisions still continue in force, the order is wholly illegal. They are not among the enactments mentioned in the Schedule to the general Repealing Act 8 of 1868, and the question arises, are they impliedly repealed by Sections 205 and 237 of the Code of Civil Procedure on which the Civil Judge has proceeded, and after some consideration we are of opinion that the Sections have not that effect.

The rule of construction "*leges posteriores priores*

1869 April 2. C. M. R. A. No. 178 of 1868.

"*contrarias abrogant*" is no doubt applicable to a new affirmative enactment, but it has application only when there is such complete contrariety or repugnancy between it and a prior enactment as makes it certain that the Legislature could not have intended the latter to stand. When there is an admissible construction by which both enactments can reasonably have operation together, that construction must be adopted. This is the well settled rule, and the instance of its application most apposite to the present case is that of a special and particular enactment and a subsequent general enactment relating to the same subject but without negative terms. It has been more that once laid down that in such a case the special enactment is not repealed.

Here the Regulation and the Act extending it are pecularly special and limited laws and their very purpose was to exempt the kinds of property particularized in the Regulation from liability to attachment under the then general law of procedure, just as was subsequently done by Act 6 of 1849 in regard to other kinds of pensions and allowances; and the reasons for the exemption remain the same. On the other hand, the Code of Civil Procedure was passed with reference to the general law of procedure and embodies it, and the Sections under consideration are simply affirmative. Section 205 is declaratory of the property of a judgment debtor which was and is liable to attachment, and Section 237 is one of a series providing for the manner of attaching the different kinds of property under a decre for money, and points out the particular proceeding to be taken when the property consists of money payable to the defendant in the hands of a Court of Justice or an Officer of Government. The language of both provisions admits of their being construed as part merely of the law intended to take the place of the general law of procedure in force when the Regulation was passed, and, so construed, they may well subsist together with the particular exemption provided by the Regulation and the Act extending it, without contrariety or repugnancy, and we think such was the intention of the Legislature. It follows that the stipend of the defendant was not liable to attachment in execution of the decree in the suit, and

the order is altogether invalid and must be set aside. Each party will bear his own costs of the appeal and of the application for the order in the Court below if any.

1869. April 2. C. M. R. A. No. 178 of 1868.

Appellate Jurisdiction (a)

Regular Appeal No. 93 *of* 1868.

MALRAJA *alias* KRISHNAMA RAJAH.........*Appellant*.

NARAYANASAMY RAJAH and another... ...*Respondents*.

In a suit for a partition of family property in the possession of the plaintiff and defendants, part of the property was attached at the instance of one of the defendants in 1852 and the remainder of the property in 1864. Nothing was done with respect to the first attachment, but in 1865 a petition was presented by the plaintiff praying for the removal of the attachments. The petition was rejected, and the plaintiff brought this suit within one year from the date of the rejection of his petition. The plaintiff and defendants remained in possession notwithstanding the attachments.

Held, that the plaintiff's suit was not barred by the Act for the Limitation of Suits.

THIS was a Regular Appeal from the order of W. S. Whiteside, the Acting Civil Judge of Chingleput, in Original Suit No. 36 of 1865.

1869. April 15. R. A. No. 93 of 1868.

The suit was brought for the recovery of real and personal property valued at rupees 1,589-5-8, to which the plaintiff and the sons of his elder brother Ramaswamiraja (who are under the plaintiff's protection,) were entitled as their one share out of 2¼ shares of real and personal property under the stipulations of a deed of division made between the 1st defendant and plaintiff's father on the 23rd August 1834.

The plaint stated that a dispute arose between the 1st defendant and the plaintiff's father Goparaja, whereupon an agreement was passed in the presence of the cirkar on the 23rd August 1834. It is stipulated therein that both the parties should appoint a gumasta in common for the management of all the ancestral property inclusive of the shrotriem village, and having divided it into 2¼ shares, and after deducting expenses of management, one and quarter share should be taken by the 1st defendant and one share by the plaintiff's father.

(a) Present: Scotland, C. J. and Collett, J.

1869. April 15. R. A. No. 93 of 1868.

The plaintiff's father continued in the enjoyment according to the stipulations of the said document until his death in May 1853.

He left at that time two minor sons, namely, the present plaintiff and his elder brother Ramaswamiraja, and they were in the enjoyment of the above shares until 1862 when the plaintiff's elder brother Ramaswamiraja died.

The said Ramaswamiraja left two minor sons named respectively Goparaja and Kodandaswamiraja, and while plaintiff was protecting the said sons and was in the enjoyment of the property according to the stipulations of the said document, the 2nd defendant caused the property to be in 1852 and 1864 attached in execution of a decree obtained against him.

Knowing the above circumstances the present plaintiff presented a Petition No. 36 of 1865 requesting the Court to release the property in the possession of the present plaintiff as well as that belonging to the minors. The said application was rejected on the 1st September, 1865, on the ground that the attachment was made a long time ago, and that it was not just to take exception to it at that time.

The defendants relied upon the Act of Limitation among other objections which they made to the plaintiff's suit.

The order of the Civil Judge was as follows:—

The plaintiff asserts in his plaint that his father, the late Gopu Razu, was in enjoyment of a certain share of the family property, (and for the recovery of which this suit is now brought) in virtue of a formal agreement entered into between himself and his brother the first defendant in the year 1834; that he continued to enjoy that property down to the date of his death in 1853 when plaintiff's elder brother the late Ramasamy Razu and plaintiff (who was then a minor) entered on their father's property and in like manner enjoyed it down to the year 1862 when plaintiff's elder brother died leaving two minor sons who have since then been under the protection of

1869. April 15. R. A. No. 93 of 1868.

plaintiff and are so now. In the year 1852 the 1st defendant caused a large quantity of the plaintiff's family property to be attached in execution of a decree due by the defendant alone, and in 1864 all the remainder was attached in like manner, and plaintiff therefore now sues to set aside both attachments and be declared the owner of the said lands.

It is to be observed that the first attachment of the lands is admitted by plaintiff to have taken place so far back as 1852 when his father was alive, and (he declares) in possession of that property, but plaintiff's father prior to his death in 1853 made no claim whatever to those lands, and in like manner plaintiff's elder brother Ramasami Raju was also silent as to his rights and took no steps to set aside the attachments of his lands on account of 1st defendant's debts up to his death, 1862. Plaintiff admits that he was then not a minor but nevertheless he also maintained complete silence on the subject of his claim to the lands until the second attachment was made in 1864 and then only did he come forward. The Court is of opinion that so far as the lands attached in 1852 are concerned the plaintiff's claim is undoubtedly barred by the Statute of Limitation. Moreover, it appears that the plaintiff's late father did in No. 508 of 1843 sue in the Pundit Sadr Amin's Court of the North Arcot district for the salt pans at Pungolam and the tamarind fruit which now form part of the property sued for by plaintiff, and in Appeal Suit 89 of 1844 on the file of the Chittoor Civil Court his claim was positively rejected. Yet the plaintiff has now included those very salt pans in this suit as if the property in question had never been adjudicated on or formed the subject matter of litigation. The plaintiff's case is clearly untenable as it stands, and the Court accordingly resolves under Section 32 to reject the plaint with costs. The plaintiff is of course at liberty to sue in the Lower Court for such portion of the property as has not yet been disposed by any competent Civil Court.

The plaintiff appealed to the High Court for the following reasons:—

I. The plaint was wrongly rejected with costs under Section 32 of the Civil Procedure Code.

1869. April 15. R. A. No. 93 of 1868.

II. The Civil Judge was also wrong in holding that, as far as the lands attached in 1852 were concerned, plaintiff's claims were barred by the Statute of Limitation.

III. Because though there was an attachment in 1852, plaintiff (or the members of his family) was not deprived of possession thereof, but has always continued in possession of the said property up to this time.

IV. Because the mere attachment will not affect the legal rights of the parties.

V. Because plaintiff was not bound to come forward to oppose and to take steps to set aside the attachment until proceedings were taken to deprive him of the possession.

VI. Even if the plaintiff's claims to this property were barred by the Statute of Limitation, he was still entitled to a share in the other lands claimed by him.

VII. The decrees No. 508 of 1843 and Appeal Suit No. 89 of 1844 do not at all affect the claims of plaintiff to the salt pans at Pungalum and the tamarind trees, but they rather establish the agreement stated in the plaint.

Srinivasa Chariyar, for the appellant (the plaintiff.)

Rama Row, for the 1st respondent, (the first defendant.)

The Court delivered the following

JUDGMENT:—This is an appeal from an order of the Civil Court of Chingleput rejecting the plaint on the ground that the suit was barred by the Act of Limitation. No evidence has been taken, but the material facts appearing from the plaint are that the property of which the plaintiff seeks to recover a share was attached at the instance of the 2nd defendant in 1852 and again in 1864. The first and only proceeding taken in connection with the attachment was the petition of the plaintiff to set it aside, which was rejected on the 1st September 1865, and the property notwithstanding the attachment remained, it appears, in the enjoyment of the family of the plaintiff

and the 1st defendant. Within a period of less than one year from the order of the 1st September 1865, rejecting the plaintiff's petition, the suit was brought.

On these facts it is clear that the suit was not barred by lapse of time. The Civil Judge proceeded, we suppose, on the ground that the cause of action arose at the time of the attachment and therefore more than twelve years before the institution of the suit. But the effect of the attachment was not to change in any way the possession of the property so as to bring the case at all within the twelve years' limitation. Even supposing the property had been taken out of the control and enjoyment of the family under an order of the Court, there would not have been adverse possession in any one so as to be a bar under the Act.

The decree therefore must be reversed, and the suit remanded for hearing and determination upon the merits. We say nothing as to the point of *res judicata* mentioned in the judgment, as that is a point not appearing on the plaint and must be determined at the hearing. The plaintiff's costs of this appeal must be paid by the 1st defendant who is the only respondent who appeared in this Court.

Appellate Jurisdiction (a)

Regular Appeal No. 31 *of* 1868.

SITARAMAIYAR.................................*Appellant.*

ALAGIRY IYER and 371 others.............*Respondents.*

The plaintiffs, mirasidars of a village held on pangavaly tenure sued their co-mirasidars the owners of the remaining shares and others, occupants of land in the village, for a partition of the common lands of the village and an allotment to the plaintiffs of specific parts thereof proportionate to the shares which they represent.

In a former suit to which all the present mirasidars were parties, either actually or as privies to those through whom they claim, it was decided that no right existed in any individual shareholder of the village to have allowed to him a distinct portion of the common lands in proportion to his share or shares.

Held, that the former decree declaring the inpartibility of the common lands of the village was conclusive in the present suit between the present shareholders upon the same question of right.

Semble,—The right to enforce a partition or allotment of the common lands of mirasi villages held on pangavaly tenure probably does exist.

(a) Present : Innes, and Collett, J. J.

1869. April 5. R. A. No. 31 of 1868.

THIS was a Regular Appeal against the decision of F. S. Child, the Civil Judge of Tinnevelly, in Original Suit No. 3 of 1865.

The plaint stated that the village of Kilpavur is a pangaval one, *i. e.*, a village divided into shares. It is divided into 9 karais (divisions) consisting of 126 shares. Of these the plaintiffs are entitled to 4½ karais consisting of 63 shares, and the co-sharers, among the defendants, to 4½ karais consisting of 63 shares.

The Agapatha nunjah lands of the above village, except the samudayam (common lands) have been already divided according to the shares, and are in the enjoyment of the co-sharers among both parties.

The samudayam (common) nunjah lands, the punai-kulam, thanaputhu and nanal kulam nunjah lands, and the nunjah and punjah lands, palmira tope, &c., of the punai kulams (tanks) mentioned in the schedule, are common.

It was decreed in Appeal Suit No. 113 of 1839, on the file of the Zillah Court of Madura on the 31st March 1838, that the properties which were common should be retained in common and the income divided and enjoyed.

Subsequent to the said decree out of the punai kulams (tanks) forming part of the common property, the thanapathu and nanal kulam nunjah lands have been for the sake of convenience divided and enjoyed between the co-sharers among both the parties according to their respective shares.

Without entering into a division with the plaintiffs of the other lands, the co-sharers, among the defendants, have from 1857 taken and attempted to take possession of all the good properties yielding a greater income, situated nearer to and forming part of the inhabited part of a village, as also a greater portion of the lands under irrigation from wells, and have sold, in pieces, the properties which were taken possession of by them; and as if the said properties belonged to each of them exclusively, they have fraudulently instituted regular suits against each other and passed razinamahs. Of the other properties, some are in

the possession of the plaintiffs, and the rest in that of the ryots. The cultivating ryots attempt to usurp the rights of the co-sharers, and have usurped the income.

Hence, the plaintiffs could not divide and enjoy the property, or the income thereof, according to their respective shares, and have thus suffered injury and loss.

Some of the defendants supported the plaintiffs' claim; the greater number, however, denied the right of the plaintiffs to enforce a division of the property specified in the plaint.

The principal issue in the case was the following:—What are the rights at the present time of pangalis in respect to the common lands in the village, and how are those rights at present exercised, and since what time has this custom prevailed?

The following is taken from the Judgment of the Civil Judge:—The practical issue in this case is what is the position of the pangalis in this village with respect to one another and with respect to those of the defendants who are not shareholders, which is the 5th issue in different language.

Now there is a most important exhibit in this suit A, which is a decree passed in Suit No. 113 of 1839 on the file of the Madura Zillah Court on appeal from the Auxiliary Court of Tinnevelly, No. 20 of 1838.

The abovementioned litigation was between certain shareholders of this very village.

The plaintiff in that case was the purchaser of a share in this village. He applied to be placed in possession of certain of the common land of this village according to the share he had purchased, and he sued other of the shareholders because they objected to the division of the common land.

The Auxiliary Judge quotes the following from pages 247 and 249 of Briggs on the Land Tax of India. "Pasang-"carie in Tamil and Saradayem in Sanscrit, are terms both "implying collective proprietary rights, and are used to "denote that particular joint tenure of land which was

1869. April 5. R. A. No. 31. of 1868.

"universal in the Tamil country and still prevails in many "villages in every part of it. Under this system the mirasi "right to any particular spot of cultivated land in the "village is not vested in any individual; the mirasi of the "entire cultivated lands attached to it, like that of the "common waste and common fallow lands belonging to "the whole body of the mirasidars each in proportion to "the shares, or parts of a share, he holds, being entitled "to participate in the common property. The number of "shares belonging to each mirasidar being known the "lands are in some cases cultivated by the whole in "common, and the net produce, after payment of tax, is "divided according to the share of each. In others, the "land is itself divided either annually or at every five, "six, or ten years, the fields of which the mirasi is to be "held by each being fixed by drawing lots."

"In many villages, however, especially in those of "Tanjore, Tinnevelly, Madura, Dindigul, and the other "Tamil Provinces to the south of the Coleroon, the mirasi-"dars, instead of dividing the cultivated lands of the "village periodically, have declared the division permanent "and have thus converted the ancient collective tenures "into one of severalty, which is distinguished by the "Tamil denomination Arudicaray, or by the corresponding "Sanscrit word Palabhogam. Under this system each "mirasidar enjoy the mirasi of his own particular culti-"vated fields, and has no interference whatever with "those of his neighbours; and when he sells his mirasi "he transfers to the purchaser not only his individual "right to certain fields, but also a right to participate in "the waste or common arable land, the mirasi maniem, or "portion of land free of tax, the marahs or corporation "fees, and other collective property in the village, in "proportion to the share of his mirasi right."

The Auxiliary Judge then decreed, keeping the above in mind, that, as this common land had not been permanently divided, and as those who were willing to divide were the majority of the shareholders, the common land should be divided.

Upon this there was an appeal, and one portion of the appeal petition is very important. In the abstract as given in the decree it is thus stated. "It is customary "among the shareholders of the village to enjoy their "respective shares of agaput nunjah (*i. e.* wet land watered "by irrigation channels from rivers, and therefore the most "valuable land in the village) until an exchange takes "place once every 12 years, but that the inhabitants (*i. e.* "those not shareholders) and shareholders cultivate in "common the punacolum nunjah (*i. e.* under rain-fed tanks "and therefore of smaller value) and punjah lands, which "lands are the common property of the village; that the "ordinary charges of the village are paid from the two-fifth "amount remitted by the circar from the assessment "levied (according to circar account) from persons who "have long enjoyment of the land by cultivating them "with grain and planting palmira and other trees, and that "the remaining amount of remission is divided among the "shareholders and that these shareholders and inhabitants "can sell the trees respectively planted by them; that in "Andu 1003 or 1827 when a muchilka for the purpose of "fixing the tax was taken in the Taluk Cutcherry from the "whole of the shareholders of the whole village in question "six distinct agreements were entered into by the share-"holders in the presence of the Tahsildar to the effect "that as soon as the tax is fixed on the agaput lands, the "same should according to their description be exchanged "in the manner hitherto observed, and the other puna-"colum nunjah and punjah lands and palmira trees enjoyed "in common perpetually without exchange."

The Appellate Court's decision is as follows:—

"It is clear that the agaputu lands of the village are "periodically divided into shares, and enjoyed in severalty, "whereas the punacolum lands are enjoyed in common.

"The quotation from Briggs on the Land Tax given "in the Assistant Judge's decree does not appear to bear "out the judgment that has been arrived at."

"From that very quotation even it appears clear to "the Zillah Court that when a shareholder in a village of "the nature described in the plaint sells his mirasi share

1869. April 5. R. A. No. 31 of 1868.

" he transfers to the purchaser only his individual right to " the fields or lands apportioned to his share, whether per- " manently or for a given period, (and if for a limited " period then to participate in any future division of the " agaput lands held in shares,) but not any individual " right to the lands held as the common property of the " shareholders, this collective property can be enjoyed by " the purchaser only in common with the other share- " holders and in proportion to the share of the mirasi " right he has purchased."

" The mode in which the property common to the " village is to be enjoyed, and the question whether any " given portion of it can be sold separately by an indivi- " dual proprietor, does not depend on whether the lands " held individually by the shareholders have been divided " permanently or only for a given number of years,—whether " the individual property has been held permanently or " otherwise the property common to the village cannot " be enjoyed, or, if saleable, disposed of separately without the " general consent of all the shareholders. No distinct portion " of the land the common property is assigned to any indivi- " dual shareholder, each shareholder enjoys a proportion of " the produce, which of course must constantly vary, and " being dependent upon the exertions of the several share- " holders, it would be extremely unjust to dispose of any " share of such common property without the unanimous " consent of all the parties interested in the village," and the Appellate Court then reversed that part of the original decree that awarded a particular portion of the common lands to the purchaser of the share.

Now this decree shows that at that time the shareholders had no separate enjoyment of certain portions of the common land in proportion to their shares or as particularly belonging to their shares as shareholders, as they had in the agaput land which had been divided amongst them, but that each shareholder had the enjoyment and proprietorship of such a share in the profits of the whole common land as fell to his share.

There is no dispute but that the shareholders are the legal proprietors of the village, though on that proprietor-

ship there are certain restrictions. In the language commonly used and employed by Mr. J. W. Ellis in his Report to Government dated 30th May 1816, pp. 172 and 217 in " Papers on Mirasi right" published by Government in 1862, they are the mirassidars of the village, but as Mr. Ellis, in his answer to the 16th question at page 213, says, there are others in a mirasi village, such as ulcudys and puracudys, and these two have a very distinct position, the ulcudy being a person who has strictly an occupation right, but has no miras privilege, such as a share in the mirasi profits or allowances, such as the two-fifth remission in this village, swamibogum, &c.

The ulcudy also pays the landlord's dues often a pepper-corn (such as the swamibogam now is, where it is paid,) the puracudy being merely one who is a tenant at will, or on special agreement.

The ulcudy, as he says, representing a copy-holder, the puracudy being merely a lease-holder.

Unfortunately in this district the term ulcudy has been dropped, and every one not a mirasidar is commonly called a puracudy, and much confusion and injustice have been the result.

Since the appeal decree of the Madura Court was passed, there has been a great amount of litigation in this village, but it has all had one object, *i. e.*, to get rid of these ulcudys by a side wind, and I regret to say it has in many instances been successful.

One shareholder has brought a suit against his elder brother or another shareholder for a portion of the share giving fixed boundaries to that share claimed directly contrary to the above decree,—the defendant puts in a razinamah allowing the right, and on plaintiff taking out execution, the unfortunate ulcudies lost their land and their rights, and till quite lately their claims were never paid any attention to. In fact it was a regular conspiracy on the part of the shareholders to get rid of the ulcudies without bringing a regular suit for that purpose when the chances are they would have failed. Appeal Suit No. 113 of 1839 of course was kept in the dark by shareholders, and when adverted to by one not a shareholder as in

1869. April 5. R. A. No. 31 of 1868.

Appeal Suit No. 57 of 1860 before the late Principal Sadr Amin, instead of taking the decree into consideration, and so learning the impropriety of the decree passed, the Principal Sadr Amin threw out the appeal, merely observing that, as the appellant (he was one only of many defendants in the original suit) was not a shareholder, it was no business of his.

The exhibit B shows exactly the game played; the 21st defendant brought one of these fictitious and collusive suits, No. 737 of 1857, on the Munsif's file; of course there was a razinamah, and the ulcudies were all turned out, and the land given to 21st defendant. Exhibit B, which I have no reason to doubt, though one of the witnesses to it denies it, is a promise of this 21st defendant to share what he may get from the ulcudies with the other shareholders,—any way in none of those fictitious suits did any of the other shareholders make any objection, and I have no doubt this would have gone on, had not the later attempts to get rid of the ulcudys on execution been unsuccessful. As it now happens the 21st defendant by his abovementioned intrigue has got into his possession a considerable portion of this punjah, panai, tope.

Some of the ulcudies, such as the 30th defendant and very many others, to escape the loss of land which they have held immemorially and expended money on, have paid to some one of the shareholders or another a certain amount for the purchase of a fraction of a share which they supposed to represent the portion of land in their possession, that is they tried to enfranchise their copyhold and make it a freehold.

This then is the exact condition of things at present in the village, and now the plaintiffs finding that there are difficulties in the way of the present success of these fictitious suits, and that those already successful will not go shares with them, have come into Court for me to divide the whole of these common lands according to their shares, and make over that land to them.

Now in the first place as shewn in the Appeal Suit No. 113 of 1839, the shareholders have no right to any particular portion of common land as shareholders; next it is not

1869. April 5 R. A. No. 31 of 1868.

pretended on either side that such a thing as a division ever took place,—therefore though if all the shareholders including such ulcudies who have bought a small fraction of a share and so have become shareholders, agreed together to divide, I could divide the shares, yet without such mutual consent I have no power whatever to divide; and that they do not all agree to divide is clear by the answers of several of the defendants. Further, I could not even then, as requested in the plaint, put them in possession of the land held by others; I could merely declare such a shareholder to be the proprietor of such land and leave him to collect his dues or proceed against the actual occupier as he thought fit.

It may be said, how are the shareholders to enforce their rights and collect their dues? It is not for me to tell them how they are to act if they cannot agree to act together,—the loss is theirs and it is not my place to act for them. There can be no doubt that a division would be the best, as each proprietor could look after his own share, collect his own dues, and enforce such rights as the law allows him; but I do not suppose they will ever agree to anything of the kind.

The above being my view of the present suit, there is nothing for it but to dismiss the plaint.

The plaintiffs appealed to the High Court upon the ground that they were entitled to claim a division of the property without reference to the consent of the other shareholders.

Srinivasa Charry, for the Appellant, the 17th plaintiff.

Vencatapathy Row, for the Respondents, the 32nd 49th, 107th, and 224th defendants.

The Court delivered the following

JUDGMENT:—The plaintiffs in this suit are mirasidars of a village held on pangavaly or share tenure, and represent half the shares into which the village is divided, and they sue their co-mirasidars, the owners of the remaining shares and others the occupants of the lands in the village, claiming to enforce a partition of what are termed

1869. April 5. R. A. No. 31 of 1868.

the common lands of the village and an allotment to themselves of specific parts thereof proportionate to the shares which they represent. It appears that the lands of the village are of two descriptions termed agaput and common lands. The former are actually divided amongst the shareholders of the village periodically and are held in severalty and they are not included and no question regarding them arises in the present suit. The latter descriptions of lands have hitherto never been divided but have been held in common, being actually cultivated either by some of the shareholders or by others (it being perfectly immaterial by whom they are held.) and the emoluments appertaining to the mirasidars derivable therefrom being brought into a common fund divisible among the shareholders in accordance with their shares. The purpose of the suit is to enforce an allotment of specific portions of these common lands to the plaintiffs in proportion to their shares. It may be a collateral object of this suit (as the Civil Judge appears to consider it to be) to get rid of the rights of those of the defendants not shareholders who have rights of permanent occupancy as ulcudies and to reduce them all to the level of parakudies or tenants from year to year. But assuming for a moment that the plaintiffs as shareholders had a right to enforce such an allotment as they seek for, it is obvious that it might be made without any injury to the rights of ulcudies if such there be among the defendants. The process would be after declaring the right of the plaintiffs to the allotment to direct an enquiry whether any and what portions of the common lands are held by ulcudies and what portions are held by parakudies and to direct an account to be taken of the quantity and value of the several lands and then by means of a commission to make an actual allotment to the plaintiffs of specific lands over which they would in future exercise their rights as mirasidars but subject of course to the rights of the tenants either as ulcudies or parakudies as the case might be. The present suit has been properly framed for such a purpose, and if the plaintiffs have the right they claim the investigation alluded to, though it would be a very tedious and difficult one,

would have to be made and would effectually settle the rights of all parties.

The Civil Judge is of opinion that no such allotment as that sought for by the plaintiffs could be made without the unanimous assent of all the other shareholders; in other words that there is no right to enforce a partition or allotment of the common lands; and we understand the Civil Judge to state this as a general proposition of law applicable to all mirasi villages held on pangavaly tenure. For reasons which we are about to give we do not feel called upon in the present suit to decide this general question as to the law governing these tenures; but as the question is (as we understand) one of very great importance in the Southern Zillahs of this Presidency, we are anxious not to be understood as assenting to the Civil Judge's view of the law on this point, and we think it right to say that, as at present advised, and acknowledging the difficulties attending the question, we incline to think that such a right probably does exist and might therefore be enforced. But in the present case there arises the preliminary question, which was fully discussed at the hearing of this appeal, whether the mirasidars, the shareholders in this particular village, are not concluded as to the existence of such a right among themselves by the decree made in Appeal Suit No. 113 of 1839. This was a suit originally brought as No. 20 of 1838 in the Auxiliary Court of Tinnevelly and then heard in appeal and finally disposed of as Appeal Suit No. 113 of 1839 in the Zillah Court of Madura. The plaintiff in that suit, as purchaser of certain shares in the village, sought to recover not only his portion in severalty of the agaput lands, but also a specific portion of the common lands proportionate to his shares. There was apparently no difficulty made as to the agaput lands, and the sole question discussed and decided was the partibility or otherwise of the common lands among the shareholders in proportion to their shares. We have carefully examined both the decrees in the suit, and it is quite clear (and indeed was conceded in argument before us) that all the then shareholders were made parties to the suit. Some of them acquiesced in the contention of the plaintiff and

1869. April 5. R. A. No. 31 of 1868.

others disputed it. The Court of First Instance decided in favor of the plaintiff and directed the allotment, but the Appellate Court reversed that decree and laid down, in the terms quoted by the Civil Judge in his judgment in the present case, that no right existed in any individual shareholder of the village to have allotted to him a distinct portion of the common lands in proportion to his share or shares. All the then shareholders having been parties to that suit, all the present shareholders parties to this suit were parties to that suit either actually or as privies to those through whom they now claim. It appears to us that the very question of right now proposed for decision was in issue and was the basis of the decision in the former suit, and that being so, the reversal of the position of the parties cannot affect the conclusive nature of the former decision. If the final decision had been in favor of the partibility of the common lands, the defendants would have been concluded by that decision upon the question of right of the shareholders *inter se*. It seems clear that they must equally be concluded when the decision was as to the impartibility of such lands. It was urged that it was a hard thing to bind a community like this village by this decision; but if, as might well have been the case, all the 126 shares into which this village is divided had been vested in two or three shareholders, it could scarcely be denied that the decision would have been conclusive upon them and their heirs or successors in estate; and the fact that the shareholders are a numerous body cannot alter the matter. We are therefore of opinion that the former decree declaring the impartibility of the common lands of this village is conclusive in the present suit between the present shareholders upon the same question of right.

The best remedy not only to meet the hardships of the present case but also to settle all doubts as to the rights of shareholders generally in pangavaly villages would probably be legislation, for it is easy to foresee that suits of this nature, even if successful in establishing the right to partition, must be attended with excessive cost, delay, and difficulty. The present case may, we think, be disposed of on the ground indicated above without touch-

ing the general question; and we accordingly affirm the decree below dismissing the suit, but looking to the special circumstances of this case, we think that we may rightly dismiss this appeal without costs.

1869. *April 5.* *R. A. No.* 31 *of* 1868.

Appellate Jurisdiction (a)

Regular Appeal No. 58 *of* 1868.

APPUNDY IBRAM SAHIB.......................*Appellant.*

MRS. MARIA VARDEN SETH SAM..........*Respondent.*

The plaintiff was by an order of the Civil Court in execution of a decree, to which the plaintiff was no party, ejected from the possession of a muttah. He brought a suit more than three years afterwards to eject the legal representative of the person who was so put in possession.

Held (reversing the decree of the Civil Court) that the order of the Civil Court was not a summary decision within the meaning of clause 5, Section I Act XIV of 1859, and that the suit was not barred.

That clause is only applicable to orders which the Civil Courts are empowered to pass deciding matters of disputed property raised for hearing and determination by a summary proceeding between the parties disputing.

1869. *April* 14. *R. A. No.* 58 *of* 1868.

THIS was a Regular Appeal against the decree of W. S. Whiteside, the Acting Civil Judge of Chingleput, in Original Suit No. 27 of 1866.

The plaintiff sued to eject defendant and recover possession of the muttah of Tripasore, in Truvalur taluq of Madras district, and for profits of the estate from 16th June 1863.

The plaint set forth that the plaintiff purchased the aforesaid muttah of Tripasore for rupees 4,950 from B. Ragavulu Chetty, as per agreement of 9th October and deed of sale of 11th November 1860, and was put in possession by the proclamation and registration of the Collector of the District, dated 22nd March 1861, subject to an annual peishkist of rupees 2,549-8-9.

The muttah originally belonged to one Gulam Husain Khan Bahadur *alias* Navoh Husain Khan Bahadur Delar Zung who sold it to one Lukpati Royji Lalah who again sold it to one Mr. James Outchterlony. The estate was subsequently conveyed to one Chengelroya Chetty and by him to the aforesaid B. Ragavulu Chetty.

(a) Present: Scotland, C. J. and Innes, J.

1869.
April 14.
R. A. No. 58
of 1868.

The defendant's late husband sued Delar Zung Bahadur his father Honorable Sir Shurful Oomra Bahadur, KT., C. S. I. Lukpati Royji Lalah and Mr. Ouchterlony in Original Suit No. 16 of 1855 on file of the late Principal Sadr Amin of Chingleput for recovery of rupees 4,614-3-5 founded on a lien arising out of the pledge of the title-deeds of Tripasore muttah, and obtained judgment holding the Tripasore estate responsible for that sum. This judgment was confirmed by Her Majesty's Privy Council on 19th July 1862.

The defendant's late husband knowing plaintiff purchased and held possession did not apply to plaintiff for the amount of his charge, but sued the former defendants in Original Suit No. 11 of 1862 on file of the Court for recovery and possession of the said muttah, fraudulently alleging " that the stipulated value of the said muttah was " rupees 4,000 bargained and sold to plaintiff (Mr. Sam) in " October 1851 by the 1st and 2nd defendants as proved " by the judgment of the late Principal Sadr Amin of " Chingleput in Original Suit No. 16 of 1855, which judg- " ment plaintiff pleads in bar against the above defendants " and all other parties privies to them by way of estoppel."

The plaintiff having been excluded as a party to Original Suit No. 11 of 1862, and his repeated applications to be admitted a supplemental defendant, rejected, had no opportunity to contest the claim therein set up and to establish the legality of his own purchase. Judgment was eventually given in favor of Mr. Sam and on its execution plaintiff was put out of possession on the 16th June 1863.

Subsequently plaintiff put in his claim under Section 230 Civil Procedure Code, in M. P. No. 318 of 1863, whereon two orders were passed on 9th and 17th November 1863. In the first order Mr. Sam was directed to prove notice to plaintiff, and in the second the petition was set aside under the belief that the High Court admitted a regular appeal on the decree by the plaintiff. On a subsequent application, dated 28th July 1864, reviving M. P. No. 318 of 1863, the plaintiff's claim was heard in Original Suit No. 5 of 1864, and judgment given in his favor; but upon

appeal the High Court on the 28th April 1856 reversed the judgment as being upon an application put forward after lapse of time allowed by Section 230, referring the plaintiff to a regular suit.

The defendant submitted that plaintiff's claim was barred under Clause V, Section 1, Act XIV of 1859.

The written statement contained other allegations relating to the merits of the suit to which it is not necessary to advert.

The judgment of the Civil Court was in the following terms;—

This suit coming up for first hearing and for settlement of issue:—After hearing the arguments of the counsel on both sides, this Court is of opinion that the plaintiff's claim cannot be maintained, inasmuch as it is barred by Clause 5, Section 1, Act XIV of 1859. By the order of this Court dated 8th June 1863 executing the decree in Original Suit 11 of 1862 the plaintiff was on the 16th idem ejected from the possession and enjoyment of the Tripasore muttah, which he alleges had been sold to him for valuable consideration and placed formally in his possession by the Collector on the 22nd March 1861. Supposing the plaintiff's claim to be true, it was manifestly his interest to have this order of the Court set aside as speedily as possible, and recover possession of the muttah. The order of this Court above quoted was clearly a summary decision within the meaning of Clause 5, Section 1, Act XIV of 1859, and the plaintiff's suit to set it aside should undoubtedly have been brought within one year from its date that is to say within the 16th June 1864, but the plaint in this suit is dated 26th August 1866, and the claim is therefore barred by limitation (*Sheikh Khyrut Alli* v. *Khuranli Dharee Singh, Marshall's Reports* I. 520) and it is unnecessary to proceed with the further hearing of this case.

The plaintiff appealed to the High Court.

The Advocate General and *Rama Row,* for the appellant, the plaintiff.

Mayne, for the respondent, the defendant.

1869. April 14. R.A. No. 58 of 1868.

The Court delivered the following

JUDGMENT:—This is a suit to recover possession of a muttah from which the plaintiff had been ejected on the 16th of June 1863 under an order passed on the 8th of the same month in execution of a decree obtained by the late husband of the defendant in Original Suit No. 11 of 1862 to which the plaintiff was not a party, and the Civil Court has decreed the dismissal of the suit on the ground that the order which it was the purpose of the suit to set aside, was a summary order or decision within the meaning of Clause 5, Section 1 of the Act of Limitations, and as the suit had not been instituted within a year of the date of the order it was barred. From the decree of the Civil Court the plaintiff has appealed, and the question to be determined is whether the clause just referred to is applicable to the suit.

The plaintiff claims to be entitled to the property in dispute under a deed of sale executed on the 11th of November 1860 by the then alleged owner Ragavulu Chetty, and his first proceeding after the decree in the Suit No. 11 of 1862 appears to have been a petition presented under Section 229 of the Code of Civil Procedure for stay of execution. That petition was held not to be maintainable, and soon after the order of the 8th June 1863 was issued directing execution to be enforced and thereupon the plaintiff was dispossessed of the property on the 16th of June 1863. The plaintiff appealed from the order on his petition to this Court, and whilst the appeal was pending he presented another petition claiming to be entitled to the muttah under the deed of sale of the 11th of November 1860, and that petition the Civil Court on the 17th November 1863 refused erroneously to entertain because the appeal to this Court was pending. The order on the first petition was affirmed by this Court and soon after, namely on the 28th July 1864, the plaintiff renewed his claim by petition and it was numbered and registered as a suit under Section 230 of the Code, and on the 19th of December 1865 the Civil Court made an order in favor of the plaintiff's claim, and directing possession of the property to be restored to him. But on appeal to this

Court, that order was reversed, on the ground that it had been passed on an application instituted more than one month from the date of the plaintiff's dispossession and was therefore not cognizable under Section 230. The order of reversal by this Court was made on the 28th of April 1866, and on the 16th of August following this suit was filed.

1869. *April* 14. *R. A. No.* 58 *of* 1868.

These facts do not, we are of opinion, bring the suit within the enactment in Clause 5, Section 1 of the Act of Limitations. That Clause is applicable, we think, only to orders which the Civil Courts are empowered to pass deciding matters of dispute properly raised for hearing and determination by a summary proceeding between the parties disputing. The concluding words of the clause "The "period of one year from the date of the final decision, "award or order in the case" seem to us to indicate clearly that orders of adjudication in pending proceedings were meant.—See the recent decision of this Court in *Ramanada Bhutt* v. *Bittu,* and another Special Appeal No. 342 of 1868 not yet reported (*a*.)

In the present case there is no such order to be set aside. The plaintiff no doubt seeks by the suit indirectly to invalidate one of the two existing orders of the Civil Court, namely, the order under which the plaintiff was dispossessed, but that is merely a part of the necessary process in the regular course of execution to enforce the decree, and there is no specific provision prescribing a period of limitation for a suit to set aside such an order like that in Clause 3, Section 1 of the Act of Limitations relating to suits to set aside sales of property under process of execution. The suit therefore was not in our opinion barred by Clause 5 Section 1 of the Act. Consequently the decree of the Lower Court must be reversed and the suit remanded for hearing and determination upon the merits. The defendant will be ordered to pay the plaintiff's costs in this appeal.

(*a*) See ante page 263.

Appellate Jurisdiction (a)

Regular Appeal No. 78 of 1868.

RANI KATTAMA NACHIAR, ZEMINDAR OF SHEVAGUNGA and another... ... } *Appellants (1st and 3rd Plaintiffs).*

SUBBARAMA AIYAN and another...... *Respondents (Defts.)*

A suit brought by the plaintiff, a Zemindar, to recover mesne profits from the defendants who held under the preceding Zemindar whose possession of the zemindary during the period included in the suit was declared to be wrongful, was dismissed by the Civil Judge on the ground that puttahs and muchilkas had not been exchanged between the plaintiffs and defendants under Section 7, Madras Act VIII of 1865.

Held, that the cause of action did not arise out of the relation of landlord and tenant, the ground of suit being that the defendants were wrongfully in the enjoyment of the villages as against the plaintiff and liable to account for all the profits received during the period of such enjoyment.

Held, further, that the period of limitation applicable to such a claim is six years before suit.

1869. *April* 16. *R. A. No.* 78 *of* 1868.

THIS was a Regular Appeal against the decree of E. C. G. Thomas, the Acting Civil Judge of Madura, in Original Suit No. 3 of 1867.

The plaintiff sued for the recovery of rupees 12,622-14-11, being the balance (after deducting what had been credited in the account of mesne profits of the zemindary for the intervening period), of the melvarum (landlord's share), from Fusli 1260 to Fusli 1272 collected by the defendants, though payable to the Zemindar of Shevagunga, for the two villages Muthankammai and Mathukammai Uthukammai in Amarapathy taluk of the zemindary, which were enjoyed by the defendants under an invalid lease granted to the 1st and 2nd defendants by Bothagurusami Tevar, the senior paternal uncle of the late Zemindar of Shevagunga, at a time when he wrongfully enjoyed the zemindary and under a sale of a portion of those villages made by the 1st and 2nd defendants to the 3rd defendant.

The plaint stated that under the decree of the Privy Council, dated the 8th December 1863, the plaintiff got the zemindary of Shevagunga and its appurtenances; and by an order of the Civil Court dated 27th February 1865, she

(a) Present: Scotland, C. J. and Innes J.

was declared to be entitled to the mesne profits thereof from and after Fusli 1260. Subsequent thereto, the defendants were demanded, but they did not pay the amount for the period during which they wrongfully enjoyed the said villages, nor did they account for or make good the melvarum (landlord's share) wrongfully collected by them during that period. Then the cause of this action accrued.

The written statement of the defendants set forth and relied upon the fact that puttahs and muchilkas had not been exchanged between plaintiff and defendants and submitted that the suit ought to be dismissed under Section 7, Madras Act VIII of 1865.

The defendants, besides relying on the validity of the lease under which they held, pleaded the Act of Limitation.

The issues were settled in the following terms :—

1. "The defendants aver their cowle valid and binding on the 1st plaintiff. The 1st plaintiff denies the same. The issue therefore is for the defendants to file and prove the cowle-deeds and their validity as against 1st plaintiff, and also the deed of sale executed between 1st and 2nd defendants and 3rd defendant."

2. "The 1st plaintiff will be allowed to bring evidence to disprove their validity."

The Civil Judge dismissed the suit.

The following is extracted from the Judgment :—

The two villages in dispute were obtained on cowle from the Zemindar now declared by the Privy Council to have been in wrongful possession in the years 1831 and 1833 respectively.

They were at that time uncultivated and covered with jungle. They were granted to the defendants on easy terms, and they have (doubtless by a considerable expenditure) brought them to a high state of cultivation and enjoyed the possession of them now 36 and 34 years respectively.

The 1st plaintiff now seeks to recover the difference between the amount of rent that she learns, from their own accounts, the defendants have lately been obtaining

1869. April 16. R. A. No. 78 of 1869.

and that mentioned in their cowle title deed as she considers this former sum to be the amount rightly leviable by her as proprietor from the time the Privy Council declared her to be the rightful owner of the estate. The demand is not for the usual mesne profits, for they have been paid and credited but for an enhanced rate.

Although issues were given, no witnesses were examined, as all the facts were admitted and each party relies on the law points they consider to be in their favor.

As to the point involved in the 1st issue, although the genuineness of the cowle-deed is not questioned, the validity of it cannot be maintained because it was granted by an individual who has been declared by the Privy Council to have had no right to the zemindary, and by the High Court to be therefore incapable of granting any deeds connected therewith and all such transactions of his must therefore be held invalid.

The 2nd issue depending upon the first, the sale-deed must be held to be invalid when the invalidity of the cowle deed is declared.

When we come to a consideration of the 3rd issue we find that the 1st plaintiff relies entirely on the decision of the Privy Council and the accounts of the defendants for a single year. To this the defendants reply that whatever the position given to the 1st plaintiff by that decree she is not entitled to the enhanced mesne profits which she now claims because she has not gone through the legal forms which can alone give her a right to them: she has not observed the conditions they say are required of her by Section 9 of Regulation V of 1822 and Section 7 of Act VIII of 1865: no exchange of puttahs and muchilkahs has taken place between plaintiff and them as landlord and tenant.

First plaintiff replies that this omission on her part was an unavoidable consequence of her position—the title was in dispute and therefore she was not acknowledged and could not act as landlord: she thus admits the defendants' argument but pleads that on account of her position the rigid letter of the law may not be strictly adhered to. She would have it equitably relaxed in her favor.

To this however it is to be remarked that

1st. Even supposing the relaxation that she asks shewn her in the absence of any agreement or of an account shewing any other amount to be leviable from these lands than those acknowledged to have been regularly due and regularly paid it is impossible for 1st plaintiff to name any specific sum as that to which she can by right lay claim.

2ndly. If equity is to be allowed to come in at all it is manifest that it should be on the side of the defendants, at whose expense a worthless part of the zemindary has been rendered valuable, and who have spent large sums in reliance on a title which they had every reason at the time to believe a good one.

Whatever the rights confirmed by the decision of the Privy Council the 1st plaintiff is of course not exempted thereby from liability to such conditions and obligations as the laws of this country lay upon her.

I am of opinion therefore that, whatever the 1st plaintiff's powers of future enhancement of the rent and of eviction, the absence of the tender of puttahs is fatal to her claim for any enhanced rate for past time.

The plaintiff's claim is therefore dismissed with all costs.

The plaintiffs appealed to the High Court.

O'Sullivan, (*The Advocate General* and *Mayne* with him) for the appellants, the 1st and 3rd plaintiffs.

Miller, for the respondents, the 2nd, 3rd defendants.

Sanjiva Row, for the 1st respondent, the 1st defendant.

The Court delivered the following

JUDGMENT:—This is a suit for the recovery of mesne profits received from two villages of the zemindary of Shevagunga from Fusli 1260 to Fusli 1272, during which time the 1st and 2nd defendants held a lease of the villages from Bothagurusami Tevar whose possession of the zemindary was afterwards decided to be wrongful. The 3rd

1869. April 16. R. A. No. 78 of 1869.

defendant held under the 1st and 2nd defendants for a part of the time. The Civil Court has decreed the dismissal of the suit on the ground that an exchange of puttahs and muchilkas as between landlord and tenant was necessary to entitle the plaintiff to recover.

This decision is clearly wrong. The cause of action did not arise out of the relation of landlord and tenant. The very contrary is the ground of the suit, namely that the defendants were wrongfully in the enjoyment of the villages as against the present Zemindar and liable to account for all the profits received during the period of such enjoyment, and there is no doubt that they are liable in the suit. The question is to what extent.

The first objection on the part of respondent was that the recovery from the Zemindar who was ejected under the decree of the Privy Council of the amount of rent which had been paid to him by the 1st and 2nd defendants was all that the present Zemindar was entitled to. But that is clearly not so. That amount was only a part of the mesne profits, and the defendants are liable to account for the remainder of the mesne profits received and retained by them.

The next objection was that the suit was barred by Clause 16, Section 1 of the Act of Limitations as respects so much of the mesne profits claimed as had been received more than six years before the institution of the suit. This objection is, we think, valid and the effect of it is to preclude the plaintiff from receiving more than the mesne profits received by the defendants in the years 1861 and 1862. The amount of these mesne profits must be ascertained by the Civil Court, and in taking an account for that purpose the Court should allow in favor of the defendants any outlay in either of these years which can be considered to have been properly incurred on account of the cultivation or in otherwise obtaining the profits of each year.

There must be a decree reversing the decree of the Civil Court and declaring that the 1st appellant the Zemindar is entitled to recover the mesne profits received and retained by the defendants during the years 1861 and

1862 and directing the Civil Court to inquire and ascertain by a proceeding in execution of the decree the clear amount of such mesne profits with which the 1st and 2nd defendants and the 3rd defendant are and is separately chargeable. The amount so ascertained the said defendants must be ordered to pay to the 1st appellant. The parties, we think, should bear their own costs of this appeal and in the Lower Court.

1869. *April* 16 *R.-A. No.* 78 *of* 1868.

Appellate Jurisdiction (a)

Special Appeal No. 384 *of* 1868.

YEKEYAMIAN.............................*Special Appellant.*

AGNISWARIAN and another.............*Special Respondents.*

According to Hindu Law sons acquire rights only in the property which belonged to their father at the time of their birth and have no legal claim to property of which a bona fide disposition, effectual as against their father, had been made long before they were born.

The right of an after-born son to share as a co-parcener divided property depends upon his mother being pregnant with him at the time of a partition.

The father of the plaintiffs adopted the 3rd defendant. After the adoption the wife of the father gave birth to a son. Thereupon the father effected a division of the property with the adopted son and gave the latter a larger share than he was entitled to receive by law. The father married a second wife and the plaintiffs were the issue of the marriage.

Held that the plaintiffs were not entitled to a partition of any portion of the property which fell to the share of the adopted son.

1869. *April* 26 *S. A. No.* 384 *of* 1868.

THIS was a Special Appeal against the decision of R. Davidson, the Civil Judge of Trichinopoly, in Regular Appeal No. 114 of 1866, modifying the decree of the Court of the District Munsif of Torriore in Original Suit No. 120 of 1865.

Srinivasa Chariyar, for the special appellant, (the 3rd defendant.)

Rama Row, for the special respondents (the plaintiffs.)

Savundranayagam Pillai, for the 1st special respondent (the 1st plaintiff.)

The facts are sufficiently set forth in the following

(a) Present : Scotland, C. J. and Collett, J.

1869. April 26. S. A. No. 384 of 1868.

JUDGMENT:—This is a suit by sons against their father and his other sons (one being an adopted son) for a division of ancestral property and possession of their shares of all the property that had been allotted to the father on a division which took place between him and his brothers in 1843. There is no dispute as to the property being ancestral and in the possession of the defendants or as to the members of the family who are co-parceners. The sole question is whether the portion of the property held and enjoyed by the 3rd defendant, the son by adoption, can be brought into the division.

It appears from the findings of the Lower Courts and the admissions in the record that some years before the division took place in 1843 the father (1st defendant), being without issue had adopted the 3rd defendant, the son of one of his brothers, and that after the adoption his wife gave birth to a son, the 2nd defendant. In consequence of his birth the father, at the making of the division, apportioned to the 3rd defendant four pungus of the land allotted to him and transferred the portion to the natural father of the 3rd defendant, he being a minor, for the absolute use and benefit of the 3rd defendant. Not long after the birth of the second defendant his mother died, and his father married a second wife who bore him the plaintiff and two other sons not yet of full age. The four pungus were more than the share to which the 3rd detendant was legally entitled at the time of the division, namely one-fourth of the share of the 2nd defendant, but how much more does not appear; and the 2nd defendant appears never to have objected to the apportionment. The Court of First Instance has upheld the validity of it and decreed to the plaintiffs their proper shares of the property in the possession of their father and the 2nd defendant. But the Civil Court has decided that the 3rd defendant is entitled to retain only so much of the 4 pungus as is equal to one-fourth of a natural son's share and decreed the delivery up of what in excess of that should be found to be in his possession.

The ground of objection to this decision on which the 3rd defendant has relied in the appeal is that the plaintiffs acquired rights only in the property which belonged to their father at the time of their birth, and had therefore no

legal claim to the land of which a bona fide disposition, effectual as against their father, had been made long before they were born, and we are of opinion that the objection is a valid one. 1869. *April 26.* *S.A. No.* 384 *of* 1868.

The Civil Judge seems to have rested his decision mainly on the passage in Chapter I, Section 1, paragraph 27 of the *Mitakshara*, referred to in his Judgment. Now the first observation that may be made is that it obviously relates to alienations by a father of family property away from the family, and we are considering a disposition by which provision was made for an adopted son having a right to a portion of the family property. But even assuming the text to be applicable to such a disposition, it does not, we think, affect the 3rd defendant's right to the portion of land allotted to him. It states the conclusion of a disquisition on proprietary right by birth :—" Therefore it is a settled point that property in the paternal or ancestral estate is by birth," and the context which follows :—" He (the father) is subject to the control of his sons and the rest in regard to the immoveable estate whether acquired by himself or inherited from his father or other predecessor," appears to be but the expression of a consequence of the right by birth. Whether the position is sound to its full extent we are not concerned to say. We have only to consider its fair import, and that is that the consent of sons is necessary to a disposition of immoveable property by reason of the right acquired at their birth. It is true that the text of *Vyasa* quoted at the end of the passage forbids a gift or sale for the sake of the support of sons unborn and even unbegotten, but it is at least very doubtful whether that text would be considered more than a moral precept in any case except in its relation to a gift on division provided for by the law of partition to be presently noticed. If however of any legal force in favor of all after born sons, it is in principle inapplicable to the disposition to the 3rd defendant, for he was entitled to provision as son by adoption and there is nothing in the case to shew that the father had not abundant means left with which to provide for the support of all his after born sons.

1869. April 26. S. A. No. 384 of 1868.

Then viewing the disposition as it was really made, namely as a disposition to effect a division between the 3rd defendant and his adoptive father, it remains to consider whether the law relating to partition warrants the claim of the plaintiffs ; whether the rights of after-born sons to a share of the property divided which no doubt is expressly declared, extends to sons not begotten at the time of the partition. The primary ordinance of *Manu,* Chapter 9 Sl. 216 is "a son born after "a division in the life-time of his father shall alone inherit "the patrimony or shall have a share of it with the divided "brothers, if they return and unite themselves with him." Upon this and the text of *Yajnavulkya* "when the sons "have been separated, one who is afterwards born of a "woman equal in class shares the distribution" and the texts of *Vrihaspati* ; "a son born before partition has no "claim on the wealth of his parents nor one begotten "after it on that of his brother—all the wealth which is "acquired by the father who has made a partition with his "sons goes to the son begotten by him after partition. "Those born before it are declared to have no right." It is laid down in the *Mitakshara,* Chapter 1 Section 1 that one born of a wife of equal class, after separation of sons from their father, takes the separate property of his parents or shares the goods with those re-united with the father after partition, and is not "a proprietor of his brother's "allotment." This relates to a division between a father and his sons, and in regard to a partition between brothers after their father's death, it is declared that "one "who is born after a separation of the brethren which took "place subsequent to the death of the father at a time "when the mother's pregnancy was not manifest," has a right to an equal allotment formed by contributions from the shares received by the brethren, and the same is declared to be the rule applicable in the case of a nephew born after the separation, the pregnancy of a brother's widow not having been mainfest at the time of the partition.

The same exposition of the law is given in the *Madhava Commentary on the Law of Inheritance* (See Mr. Burnell's Translation page 13) ; in the *Smruti Chandrika* by Krist-

nasawmy Iyer, Chapter 13; and in the *Vyavakura Mayukka*, Chapter 4 Section 4 para 3 seq. It is to be found also in the *Daya Bhaga*, Chapter 7 and seems to be upheld in Bengal even against the rule "Factum valeat" obtaining there. Plainly then the right of an after-born son or nephew to share as a co-parcener divided property depends upon his mother being pregnant with him at the time of the partition. From conception by his mother membership with the family is considered as commencing. Accordingly it is enjoined in the same Section of the *Mitakshara* that if the mother "is evidently pregnant, the distribution "should be made after awaiting her delivery." It might be questioned whether this right of an after born son was not even confined to a posthumous son. It appears to be so treated in 1 *Strange's Hindu Law* 207, but in reason there seems to be no admissible distinction between such a son and one born subsequent to the partition in his father's life time, and at present we consider that if either of the plaintiffs had been begotten when the division took place on which the land in dispute was allotted to the 3rd defendant he would have had a right to a portion of it. As however the fact is that neither of the plaintiffs was begotten until long after the division, we think the 3rd defendant has a valid right to his allotment as against them.

The vakil of the respondent referred in argument to the pundits' opinion quoted in page 11 of *Mr. Macnaghten's Principles of Hindu Law*, and the author's comments upon it, as containing the recognition of a father's incompetency to make a valid disposition of ancestral property to a son while his wife continued to be capable of bearing children, but what appears there is simply a reference to passages which state as a condition of the right to make a division that the wife should be past child-bearing, in support of an opinion against the validity of a disposition by a father in favor of one of two sons living at the time to the detriment of the other. That is no authority for the application of the position referred to to the present case. Further it is a position founded on the duty of caring alike for the support of sons born, and that may be born, inculcated in the texts of *Vyasa* before adverted to and other sages, and there can be no doubt that it has not at

1869. April 26. S. A. No. 384 of 1868.

the present day any legal prohibitory operation on the exercise of the right to make a partition. A division may be made by agreement or be enforced between father and sons as well as between other co-parceners and the express authoritative provisions which we have just considered establish that the legal contingency of an after-born son subject to which the co-parceners take their portions is strictly limited to a son begotten at the time that the division took place.

For these reasons the decree of the Civil Court must be reversed, and that of the District Munsif's Court affirmed. The 3rd defendant's costs in the Civil Court must be paid by the plaintiffs, but the parties should, we think, bear their and his own costs of this appeal.

Appellate Jurisdiction. (a)

Special Appeal No. 487 *of* 1868.

ARUNACHELLUM CHETTY and 3 others*Special Appellants.*

OLAGAPPAH CHETTY and 3 others......*Special Respondents.*

Plaintiffs sought to eject the defendants from certain land of which the defendants had wrongfully taken possession and on which they erected a building. The defendants alleged that the land had been exchanged for another piece of land now in the possession of the plaintiff. The facts found were that there was, with the assent of the 1st plaintiff, an agreement to make an exchange, and that in pursuance that agreement the boundaries were marked out and the building commenced and continued with the knowledge of the plaintiff from August 1865 to January 1866 when the plaintiffs first interfered to stop it, but that the plaintiffs were in possession of the land given in exchange. The Lower Courts dismissed the suit.

Held, on special appeal that, there being no evidence to prove that the land sued for had become the property of the defendants, but the plaintiffs having acquiesced in the defendants taking possession and building upon it, and the plaintiffs having retained possession of the adjacent land, the proper decree to make was that the plaintiffs, on giving up the land of which they had taken possession and paying the defendants the value of the buildings, were entitled to the possession of the land sued for.

Secondary evidence cannot be given of a lost instrument requiring a stamp which was not stamped.

Quaere Whether permission to pay the stamp duty and penalty can be given in the case of a lost instrument.

1869. April 28. S. A. No. 487 of 1868.

THIS was a Special Appeal against the decision of G. R. Sharpe, the Civil Judge of Madura, in Regular Appeal

(a) Present: Bittleston and Innes, J. J.

No. 34 of 1868, confirming the decree of the Court of Small Causes at Madura, on the Principal Sadr Amin's Side, in Original Suit No. 32 of 1867. 1869. April 28. S.A. No. 487 of 1868.

The Advocate General and *Mayne*, for the Special Appellants (the plaintiffs.)

Handley and *Kuppuramasastry*, for the 1st Special Respondent, the 1st defendant.

The facts sufficiently appear from the following

JUDGMENT:—This suit was brought to recover possession of a piece of ground, being two-thirds of a larger plot alleged to have been illegally taken possession of and built upon by the 1st and 2nd defendants with the consent of the 3rd defendant, the brother of the 4th plaintiff.

The 1st defendant alone appeared and alleged that the land in dispute belonged to him and the 2nd defendant, having been received by them in exchange for other land which the plaintiffs had received from them. The defendants gave parole evidence of this exchange, and the Principal Sadr Amin found that there was with the cognizance and assent of the first plaintiff an agreement to make an exchange, that a written memorandum was made of that agreement, and that in pursuance it of the boundary was marked out and the work commenced, although afterwards the plaintiffs opposed the progress of the building. He accordingly dismissed the suit with costs.

On appeal, the Civil Judge held that, as the written memorandum of agreement which had been lost was admitted by the 1st defendant to have been unstamped, no secondary evidence of its contents was admissible, and that consequently the agreement of exchange could not be proved; but he found as facts that the 1st plaintiff was certainly present at the measurement of the land, that the plaintiffs are now enjoying the land given in part exchange for the disputed property, and that the plaintiffs were aware of the progress of the building from August 1865 to January 1866 when they first interfered to stop it. Upon these grounds he confirmed the decree of the Lower Court.

1869. April 28. S. A. No. 487 of 1868.

It appears to us that the suit ought not to be dismissed unless the defendants have established that the land in question, which admittedly belonged to the plaintiffs and 3rd defendant down to July 1865, has become the property of the defendants; and this they have not done and cannot do.

It seems to be clearly found in the Lower Courts that the alleged agreement of exchange was reduced into writing and that the writing was not stamped. We concur therefore with the Civil Judge in thinking that secondary evidence of the agreement could not be received, unless that objection may be obviated by payment of the stamp duty and penalty. The language of the Stamp Act X of 1862, Section 17 is not appropriate to the case of a lost instrument, for it requires the entry of payment of stamp duty and penalty to be endorsed on the writing and signed by the Court, and though we do not think it necessary now to decide that if an application were made at the proper time, permission to pay the stamp duty and penalty might not be granted even in the case of a lost instrument, still we entertain serious doubt whether that could be done. The Legislature may probably have thought it proper to relax in a certain degree the provisions of the stamp law for the purpose of rendering the written agreement of the parties admissible in evidence but not proper to do so for the purpose of letting in secondary evidence of the contents of a written agreement alleged to be lost. In the present case, however, the application was only made after the close of the arguments of this special appeal, though the objection that the document was unstamped was clearly taken in the grounds of appeal to the Civil Court; and there was therefore no error of procedure in the Lower Appellate Court. A further objection was raised during the argument of this special appeal that the instrument of exchange had not been registered under Act XVI of 1864; but this is not taken as a ground of special appeal, and though the fact was not disputed by the Counsel for the special respondent, and it was not contended that the instrument was not one which would require registration, we should probably have thought it necessary to send the case back to have those

questions expressly determined if the decision of the case depended upon them.

The case then stands thus. There is no evidence to prove that the plot of land sued for has become the property of the defendants; but the plaintiffs have acquiesced in the defendants taking possession of it and building upon it, and have themselves at the same time taken and retained possession of another piece of land adjacent to the plot in question. It is therefore clearly contrary to equity and good conscience that they should insist upon their right of property without making compensation to the defendants for the building erected on the land, and restoring to the defendants the piece of adjacent land held by them. It is the province of a Court of Equity to restrain the exercise of legal rights of property, so as to prevent injustice, where the owner has by his conduct induced another to lay out money upon the supposition that the legal right would not be exercised to his prejudice, (*Jackson* v *Cator* 5 *Vesey* 688) where an owner having a strict legal right to cut down all trees was restrained from cutting down ornamental trees during a term, his conduct having amounted to acquiescence in improvements made by the tenant.

The Civil Judge has found the outlay in building to be 500 rupees upon the admission of the parties, and we think that the proper decree to be made in this case is that upon payment by the plaintiffs to the 1st and 2nd defendants within two months of the sum of rupees 500 and interest thereon at 6 per cent. from January 1866, and upon the restoration within the same period by plaintiffs to 1st and 2nd defendants of the plot of land referred to in the Judgment of the Principal Sadr Amin as the spot B, the defendants do deliver to the plaintiffs the land sued for with the building thereon, each party bearing their own costs; but that in default of such payment and restoration the suit be dismissed with costs throughout.

To this extent the decree of the Lower Courts must be modified.

Appellate Jurisdiction (a)

Civil Miscellaneous Regular Appeal No. 25 *of* 1869.

B. BROOKS, ESQUIRE, Official Assignee, and as such the Assignee of the estate and effects of VURDALOCA CHARY.............. *Petitioner.*

PATTAM MARI NUNJAPPA NAICK....*Counter Petitioner.*

An attachment of property in execution of a decree operates *de die in diem* as process of execution upon a decree.

The late Sudder Court, by an order dated the 25th July 1855, directed that the judgment-debtor should be allowed to remain in the enjoyment of the property then under attachment, that an order for the sale of the property should be stayed, but that the attachment should continue in force until the further order of the Court.

On the 10th of May 1868 the High Court made an order setting aside the order of the Sudr Court dated the 25th July 1855 and stating that the assignee of the judgment-creditor should be left at liberty to apply for execution of the decree.

Upon application to the Civil Court of the district in which the property was situated the Court decided that the application to obtain execution was barred by Act XIV of 1859.

Held by the High Court, that the right to enforce payment of the amount payable under the decree was not barred.

1869. *April* 30. *C. M. R. A. No.* 25 *of* 1868.

THIS was an appeal against an order of C. F. Chamier the Civil Judge of Salem, dated the 21st December 1868.

In this case the petitioner sought, as the assignee of one Vurdaloca Charry, who had become an Insolvent, to obtain execution of a decree of the late Sadr Court in Appeal Suit No. 9 of 1843. The petition stated that the plaintiff in the suit was Predavagherry Josayee and the defendant Peddaputta Narainsawmi Naidu, Poligar of Bagalore, and that a decree was obtained against the defendant. On the 12th of October 1846, the interest of Predavagherry Josayee was assigned to Jagadavagherry Josayee who undertook to collect the amount payable under the decree and to pay it to Predavagherry Josayee after making certain deductions ; but nothing was recovered by Jagadavagherry Josayee.

Predavagagherry Josayee died in 1849 leaving his adopted son, Davagherry Josayee, his legal personal representative him surviving. Davagherry Josayee died on the 11th August 1856 leaving Gungagherry Josayee his legal representative him surviving.

(a) Present : Scotland, C. J., and Collett, J.

1869. April 30 C. M. R. A. No. 25 of 1868.

Davagherry and Gungagherry Josayee, by two instruments in writing, dated respectively the 15th of September 1855 and the 26th January 1858, assigned their interest in the decree to Vardaloca Charry.

Jagadavagherry Josayee, the assignee, died in February 1854 leaving his adoptive father Jolingherry Josayee him surviving.

On the 19th August 1854 a razinamah was presented to the late Sadr Court signed by Jalingherry Josayee and the judgment-debtor whereby the judgment-debtor agreed to pay the amount of the decree by instalments.

On the 12th October 1854 Davagherry Josayee, the son of the plaintiff, presented a petition to the Sadr Court stating that the consideration agreed upon between Predavagherry and Jogadavagherry Josayee for the assignment of the decree had not been paid, and praying that the assignment might be set aside. The Sadr Court, by an order dated the 8th January 1855, rejected the petition, and referred the petitioner to a regular suit in respect of any claim which he had against the holder of the decree.

On the 18th July 1855 another razinamah signed by Petambara Row, the agent of the decree-holder, Jalingherry Josayee, and the judgment-debtor, was filed in the Sadr Court whereby it was agreed that the judgment-debtor should pay the amount of the decree by instalments, but that the judgment-debtor should remain in possession of the Polliem subject to the then attachment of the Court.

On the 25th July 1855 the Sadr Court made an order directing the Civil Judge of Salem not to sell the Polliem but to place it under the charge of the judgment-debtor and to hold it under attachment until further orden

On the 9th November 1854 Petambara Row, who was the gumastah of Jalingherry Josayee and acted under a written authority authorising him to collect the amount of the decree and to take all necessary proceedings in the matter, entered into an agreement with Davagherry Josayee, the son of the plaintiff, in which he undertook to pay to the latter the amount due to him under the decree.

1869. April 30. C. M. R. A. No. 25 of 1868

On the 16th July 1859, a bill was filed on the Equity Side of the late Supreme Court by Vurdaloca Charry against Petambara Row and others.

The bill prayed for an account of what was due upon the decree and of the moneys received by Petambara Row on account thereof. The bill stated the various agreements between the parties and the proceedings taken to enforce the decree. Petambara Row in his answer admitted the receipt of rupees 8,010-5-4 under the decree, but denied his liability to account to the plaintiff. By the decree of the Supreme Court dated the 12th September 1862 it was referred to the Master to take an account of what was due upon the decree and of the amount received by Petambara Row on account thereof.

Vurdaloca Charry and Petambara Row having become insolvent and died, the suit was revived by the Official Assignee. By the final decree of the High Court of Madras dated the 11th July 1866, it was declared that the plaintiff by revivor, the official assignee and as such the assignee of Vuradaloca Charry, was entitled to all the rights of Davagherry Josayee under the decree of the Court of Sadr Adalut in the Appeal Suit No. 9 of 1843, and that Petambara Row was indebted to the estate of the plaintiff by original bill in the sum of rupees 6,010-5-4, being the balance upon the amount received by him under the decree of the Court of Sadr Adalut.

On the 26th April 1867 an application was made by the petitioner to the Civil Judge of Salem to proceed with the execution of the decree. The application was refused on the ground that, so long as the order of the Sadr Court of the 25th July 1855 remained in force, the Civil Judge could not take any further step in the execution of the decree.

On the 10th May 1868, the High Court on its Appellate Side, made an order that the order of the Sadr Court dated the 25th July 1855 be set aside and that the petitioner as official assignee and as such entitled to all the rights of Vurdalocharry deceased be left at liberty to apply to the Civil Court of Salem to enforce payment of the amount payable under the decree.

An application was accordingly made to the Civil Court, which was refused by the Civil Judge upon the ground that the right claimed was barred by the Act of Limitation.

The petitioner appealed to the High Court.

O'Sullivan for the Petitioner.

Vencatapathy Row, for the counter Petitionr.

The Court delivered the following

JUDGMENT:—The question which the Court is called upon to determine in this case is whether process of execution to enforce the decree in Regular Appeal No. 9 of 1843 is barred by Section 20 of the Act of Limitation. That decree was passed in 1844 and was transferred in 1846, and the transferee took proceedings to enforce it, which were continued after his death by his heir. Those proceedings resulted in a razinamah and an order of the Sadr Court thereupon, dated the 25th July 1855, sanctioning payment of the amount decreed by instalments and directing that the judgment-debtor should be allowed to remain in the enjoyment of the property then under attachment, and that an order for the sale of it should be stayed, but that the attachment should continue in force until the further order of the Court. That order remained unaltered until the passing of the recent order of this Court, and by force of it the attachment has been operating *de die in diem* as process of execution upon the decree, and at any time further process for the sale of the property might have issued upon the attachment by leave of the Sadr Court or this Court on the application of the party entitled to the judgment-debt.

Clearly therefore there was a continuing proceeding in execution of the decree down to the date of the present application for execution, and consequently the application was not barred by Section 20 of the Act of Limitations. We do not think that it makes any difference on this point that the order of the Sadr Court was made at the instance of Jalingherry, whose claim at the time was resisted by the heir of the original decree holder from whom the insolvent claimed by assignment. The official assignee

1869. April 30. C. M R. A. No. 25 of 1868.

claims to have vested in him the complete right to all that remains due of the judgment-debt, and, assuming that he can substantiate his claim by proof, he is the transferee now entitled to the benefit of the attachment in execution of the decree.

The order appealed from must be set aside, and the appellant left at liberty to renew his application for process of execution. Upon such application the Civil Court will hear and determine the claim upon its merits. The appellant's costs of this appeal must be paid by the respondent. The costs in the Civil Court will abide the determination of the Court in the renewed application and be paid by the party who fails. If the application should not be renewed within one month from the re-opening of the Court after the adjournment each party will bear his own costs.

Miscellaneous Petition No. 79 of 1869 put in by Mr. Mayne on behalf of Vencataramangeri Josayee, but which was not argued in consequence of our intimating the opinion we had formed, will be simply dismissed.

Appellate Jurisdiction (a)

Special Appeal No. 612 *of* 1868.

THESIKAM IYENGAR and another...*Special Appellants.*
GANAPATHY IYER and 3 others......*Special Respondents.*

By an agreement entered into between the predecessors of the plaintiffs, Durmakartas of a Temple, and the defendants it was provided that the defendants should have a permanent right of cultivating certain lands belonging to the Temple upon payment of the circar tirva and a swamibogam mentioned in the agreement. Subsequently to the agreement the Government notified that the melvarum payable to the Government would be thenceforth permanent and not according to the nerick ascertained by reference to the market prices in certain towns, and the Government stated that any advantage arising from the change of system should go to the ryots themselves.

The plaintiffs sued the defendants to recover the balance of the market value of the produce of the land cultivated by the defendants after deducting the amount of circar kist paid by them.

Held,—(reversing the decree of the Lower Courts) that the defendants were only liable to pay the amount of swamibogom mentioned in the agreement and that no right was acquired by the plaintiffs by virtue of the subsequent arrangement made by the Government.

1869. May 4. S. A. No. 612 of 1868.

THIS was a Special Appeal against the decision of A. D. Srinivasa, the Principal Sadr Amin of Tinnevelly, in Regular Appeal No. 424 of 1866, confirming the decree of

(a) Present: Scotland, C J, and Carmichael, J.

the Court of the District Munsif of Brammadesum in Original Suit No. 157 of 1866.

1869.
May 4.
S. A. No. 612 *of* 1868.

The suit was brought by the plaintiff, one of the durmakurtas of the Subhandraraja Permal pagoda. The plaint stated that out of the market value of melvarum paddy of two and half years of certain land set apart for certain ceremonies of the said pagoda, the circar tirva paid by the 1st and 2nd defendants should be deducted, and that the balance should be recovered from them.

The 1st and 2nd defendants denied the claim.

The District Munsif gave a decree in favor of the plaintiffs. The following is taken from the District Munsif's judgment :—

It is undisputed that the land referred to in the plaint belongs to the plaint pagoda, and that the 1st and 2nd defendants are bound to pay to the pagoda swamibogum either in paddy or in market value on account of the said land,—this is a fact which the defendants admit.

The moment the 1st and 2nd defendants admit that they are liable to pay swamibogum to the plaint pagoda, it is clear that the said pagoda is the owner of the said land that the deity alone is the tenant, and that the 1st and 2nd defendants are purakudies.

On the produce of any land there are three sorts of varum; they are the purakudie's varum payable to the individuals who cultivate the land as purakudies, the swamibogum or kudivarum payable to the owner of the land, and the melvarum payable to the circar. According to this arrangement, the purakudi varum has been enjoyed by 1st and 2nd defendants, the melvarum by the circar, and the swamibogum or the kudivarum by the plaint pagoda. As two sorts of varum have been paid by the 1st and 2nd defendants, it is further established they are purakudies of the said land.

The land referred to in the plaint appears to be in the possession of the 1st and 2nd defendants under the former consent of the plaintiff and others.

Defendants appealed, and the Principal Sadr Amin dismissed the appeal. He delivered the following judgment :—

1869.
May 4.
S. A. No. 612
of 1868.

In Original Suit No. 121 of 1851 before the District Munsif of Brammadesam brought by the then durmakurtas of the temple of Suanthararaja Perumal at Viranallur against these 1st and 2nd defendants and another for rent and ejectment, a razinamah was filed on the 30th December 1852, and it provided among other things that the 1st defendant and his heirs should allow the temple a fixed annual rent of 45 kottas of paddy, besides paying to the Government the usual assessment of the lands. In 1859, the Government resolved to take the value of their melvarum at a fixed favorable rate and the 1st and 2nd defendants have ever since enjoyed the profit accruing from this arrangement, *i. e*, the difference between commutation and market prices of the melvarum paddy. Now the durmakurtas allege that the proprietary title of the lands being in the temple and the 1st and 2nd defendants being its tenants the temple is entitled to this profit and therefore sue for rupees 732-3-1 the estimated profit of a certain period prior to the suit.

The 1st and 2nd defendants who are the substantial defendants contend that they are the owners of the land and that the temple is entitled to nothing more than the rent fixed by the razinamah of 1852.

The Lower Court found that the temple was entitled to the profits in dispute and decreed to the plaintiffs rupees 678-10-1. From this decision the 1st and 2nd defendants appeal now.

The razinamah of 1852 which is filed in this case as the defendant's document II distinctly states that the lands belong neither to the plaintiffs nor to the defendants nor to the villagers but to the temple, that no one could encumber or alienate the lands, and that the 1st defendant and his heirs should cultivate them "with the right of cultivation" subject to payment of rent and assessment. After such an emphatic and clear admission of the temple's right, it is absurd on the part of the opposing defendants now to deny that title and to claim to be the proprietors of the land. The Lower Court was therefore perfectly right in finding that these defendants were only the tenants of the temple. This being so it is clear to my mind that

the profit arising from the olungu or commutation system should go to the landlord and not to the tenant. 1869. May 4. S. A. No. 612 of 1868.

The decree below must therefore be confirmed and the appeal dismissed.

The 1st and 2nd defendats preferred a Special Appeal to the High Court setting forth the following reasons:—

I. The plaintiffs as durmakurtas of the pagoda are not entitled to the profit arising from the commutation directed by the Government in 1859.

II. The Lower Courts have misconstrued the legal effect of the razinamah relied upon by the plaintiffs.

Scharlieb, for the special appellants, the first and second defendants.

Mayne, for the special respondents, the second and fourth plaintiffs.

The Court delivered the following

JUDGMENT:—The plaintiffs in this case have been decreed by both the Lower Courts the balance of the market value of the produce for three fuslies of the land cultivated by the 1st and 2nd defendants as parakudi tenants after deducting their share and the amount of the circar kist paid by them. And the question raised in the appeal is whether the plaintiffs were entitled to a decree for more that the amount of swamibogum payable under the agreement entered into on the 30th of December 1852 between the plaintiffs predecessors in the office of durmakurta and the 1st and 2nd defendants.

That agreement provides for a permanent right of cultivation and the granting of puttahs subject to the payment of the circar tirva and a fixed yearly swamibogum of 45 kottas of paddy from Fusly 1262 (1852) calculated at the rate of 8 kottas per kotta of the land. Under it the defendants have held and still continue to hold as tenants, and very recently before the present suit the plaintiffs brought a suit (No. 96 of 1866) to enforce payment of arrears of the swamibogum fixed by it. There is then a subsisting contract of tenancy which binds strictly the plaintiffs as well as the defendants in regard to the amount of swamibogum, and if the plaintiffs can exact what has been decreed them in excess of that amount, it

1869. May 4. S. A. No. 612 of 1868.

must be on the ground of a fresh right acquired by the arrangement sanctioned by the Government in 1859.

The extract from the *District Gazette* proves what the arrangement was. The Government considering that the practice of settling the jumabundy according to the " nerick" ascertained by reference to the market prices in certain towns, instead of according to the " Olungu nerick" formerly fixed for each village, had been oppressive to the ryots, it was notified by the Collector to all the ryots that the " Olungu nerick" would from Fusly 1269 be the only jumabundy nerick; that by the change the profits arising from sales of paddy at higher prices than the Olungu rates would go to the ryots themselves,—and that thenceforward claims for remission would not be admitted except in the case of very heavy loss occasioned by unavoidable causes, such as want of water. Obviously the arrangement was intended to operate as a commutation of the Government melvarum for the benefit of the ryots, and in consideration of such benefit they have been thereby placed in a less favourable position as respects remission of the melvarum.

It was a concession to the ryots of the right to cultivate at a fixed melvarum, and the plaintiffs having had as durmakurtas no interest in the melvarum before the concession was made it is clear that they did not thereby acquire any right to that portion of the produce of the land which but for the concession would have gone to the Government as melvarum. Swamibogum is a distinct due, and the plaintiffs' right and the defendants' liability thereto are subject to the terms of the agreement subsisting between them.

For these reasons the decrees of the Lower Courts must be reversed, and it must be declared that the plaintiffs are entitled to recover as the annual swamibogum of the land mentioned in the plaint only 45 kottas of the produce, and the 1st and 2nd defendants must be ordered to pay the value of the arrears for the three fuslies mentioned in the plaint calculated at the rate of rupees 7-4-0 per kotta. We think the plaintiffs and the defendants should bear their own costs in the Court of First Instance and that the 1st and 2nd defendants costs in this and the Lower Appellate Court should be paid by the plaintiffs.

Appellate Jurisdiction (a)

Special Appeal No. 600 *of* 1868.

KONI CHETTY and two others............*Special Appellants.*

(Plaintiffs.)

VERIAPPA CHETTY and 28 others......*Special Respondents.*

(Defendants).

An agreement entered into between the plaintiffs and defendants, members of the same caste, contained a stipulation that in the event of the defendants objecting to the receiving of a girl from or the giving a girl to the plaintiffs in marriage, the defendants should be bound to return rupees 500 with interest which the plaintiffs had paid to the defendants under the agreement. It was found by the Civil Judge that the 15th defendant's son was engaged to be married to the 2nd plaintiff's daughter, and that the marriage was broken off on the part of the 15th defendant.

Held, on special appeal, that this was *prima facie* a breach of the agreement which entitled the plaintiffs to recover, and that it was for the defendants to show that it did not bring them within the terms of the agreement.

THIS was a Special Appeal against the decree of C. F. Chamier, the Civil Judge of Salem, in Regular Appeal No. 127 of 1868, confirming the decree of the Court of the Principal Sadr Amin of Salem in Original Suit No. 9 of 1868.

1869. *May* 4. *S. A. No.* 600 *of* 1869.

The suit was brought to recover rupees 1,000 as principal and interest due under the terms of an agreement executed by the defendants 1 to 22, by the fathers of defendants 24 to 27, and by the husbands of the 23rd, 28th, and 29th defendants for rupees 500 on the 16th August 1857.

The plaint stated that the plaintiffs and defendants belonged to the same caste; that they and their adherents were divided into factions; that in consequence of some disagreement, the people belonging to each faction used to have the auspicious and inauspicious ceremonies performed separately and to mess separately on such occasions; that on the 16th August 1857 certain mediators adjusted the disputes between them, and, after making the 1st and 2nd plaintiffs and 3rd plaintiff's father pay a sum of

(a) Present: Innes, and Carmichael, J. J.

1869. May 4. S. A. No 600 of 1869.

rupees 500 to some of the defendants and their ancestors, had an agreement passed by the defendants in favor of the plaintiffs; that the terms of the agreement were that both parties should thenceforward meet together and mess together on the occasion of auspicious and inauspicious ceremonies, and that in the event of the defendants failing to act up to the terms of the agreement, or raising objection to the receiving or giving a girl in marriage, they should be liable to return the money with interest. The conditions of the agreement were fulfilled up to 1864 and then deviated from; and therefore the suit was brought to recover rupees 1,000 as principal and equal interest.

Some of the defendants admitted the claim. Others stated that the agreement was a forgery.

The following is taken from the judgment of the Principal Sadr Amin:—

The only issues for consideration in this case are, first, whether the agreement A sued on was true and, secondly, whether its terms were deviated from by defendants.

The evidence adduced by plaintiffs fully establishes the genuineness of the agreement A; but to entitle the plaintiffs to receive back its amount it must be shewn that there was a breach on the part of defendants.

Now the plaintiff's witnesses themselves state that both parties had acted up to the terms of A for some time, and then ceased to do so from some unknown cause. They are unable to speak as to which of the parties the breach is to be attributed, and the second point cannot therefore be held to have been made out.

The plaintiffs, having thus failed to shew that they had a cause of action, cannot be allowed to maintain their claim.

Upon appeal to the Civil Court the Civil Judge affirmed the decision of the Principal Sadr Amin.

The Civil Judge's judgment contained the following observations:—

As regards the contract, I think it was valid and binding, being founded upon a valuable consideration and that it was not illegal. In was not in restraint of marriage, but rather the reverse, as it provided for intermarriages between the parties. I see no reason to doubt that A is genuine. The only question for determination is whether there has been any breach on the part of the defendants. It is impossible that the plaintiffs can recover the liquidated damages set out in the agreement, unless they prove expressly that the terms of the contract, evidenced by A, have not been complied with. It appears that the plaintiffs were not strictly within the caste, and thought it worth their while to purchase equality in social and ceremonial observances at the price of five hundred rupees. This enabled them to meet the defendants on auspicious and inauspicious occasions, to eat and associate with them, and to intermarry with them. It is admitted that for seven years the defendants acted up to their agreement. It may reasonably be inferred, therefore, that their aversion to the society of the plaintiffs and their offspring had been quite overcome No reason is assigned for their afterwards avoiding the company of the plaintiffs, and the evidence adduced to support this allegation is of the most vague and meagre kind possible. Only one instance is spoken to of any objection to contract marriages. In the case it is said that the 15th defendant's son was engaged to the 2nd plaintiff's daughter but that the marriage was broken off. A reason, however, is given for this change of intentions which ought perhaps to weigh with these litigants, namely, that the 15th defendant had experienced a bad omen, which may mean that he had a bad dream, rendering the marriage undesirable. The circumstance of his having betrothed his son to the 2nd plaintiff's daughter seems to indicate that he had no intention of violating the contract; and I think there is nothing to justify the conclusion that in afterwards drawing back he acted in bad faith. I do not consider that there was a breach of the contract because in this single instance the marriage was not effected. It was necessary to show that the marriage was broken off on account of a reluctance on the part of the defendants, as a body, to form matrimonial alliances with the plaintiffs. The rest of the

1869. May 4. S. A. No. 600 of 1869.

evidence merely shows that for the last four years the parties have not been associating with each other; but no witness is able to say that the fault lies with the defendants. Without specific proof on the above points the plaintiffs cannot recover damages, because if no breach has been committed no right of action has yet accrued. It is sufficiently clear from the circumstances of this suit that there is no general aversion to the plaintiffs on the part of the contractors, because a considerable number of them have sided with the plaintiffs and supported their case. They do not, however, admit that they have been personally guilty of any breach of the contract, and I think their answers are collusive. The common object of these persons and the plaintiffs seems to be to fix the liability exclusively upon the remaining defendants. If a breach had been established, however, all the defendants would have been jointly liable. I cannot adjudge the defendants to refund the money upon such evidence as has been adduced in this case. I therefore confirm the decree of the Lower Court and dismiss this appeal with costs.

The plaintiffs preferred a Special Appeal to the High Court on the following grounds:—

I. The breaking off of the marrige was a breach of agreement.

II. The cessation of intercourse between plaintiffs and defendants is admitted, and it lay upon defendants to show that this arose from the plaintiffs' fault.

Mayne, for the special appellants, the plaintiffs.

G. E. Branson, for the 3rd and 20th special respondents, the defendants.

The Court delivered the following

JUDGMENT:—The question in this case for the decision of the Courts below was whether an agreement had been entered into by the defendants with plaintiffs on the 16th August 1857, and whether there had been any such breach of it on the part of defendants as would entitle the plaintiffs to the damages claimed. Plaintiffs and defendants

belong to separate factions of the same caste, and in consequence of some misunderstanding had for some time avoided social intercourse with each other on the occasion of the performance of ceremonies, each treating the other as a separate caste.

To adjust their differences the agreement was entered into for the breach of which damages are now sought by plaintiffs.

The Principal Sadr Amin and the Civil Judge found that the acts proved did not constitute a breach of the agreement by the defendants.

The agreement was proved to be genuine, and in this special appeal we have to determine whether the acts of defendants as found by the Courts below constitute a breach of this agreement.

One of the express stipulations in the agreement was that in the event of the defendants objecting to the receiving or giving a girl in marriage they should be liable to return with interest the 500 rupees which under the agreement the plaintiffs had paid to the defendants, and one of the facts found by the Civil Judge is that the 15th defendant's son was engaged to the 2nd plaintiff's daughter, and that the marrigae was broken off on the part of 15th defendant. This constituted *prima facie* a clear breach of the agreement, and it rested with the defendants to show that it did not bring them within its terms. The Civil Judge seems to have been influenced by the apparent unfairness of assessing damages on all the defendants for the act of the 15th defendant; but if the defendants in undertaking to exercise a control in matters of this kind over the individual members of their caste assumed to have a power which in reality they did not possess they are not the less liable for failing to do that which they undertook to do. We do not agree with the Civil Judge that it was necessary to show that there had been a general reluctance on the part of the caste to give their women in marriage. We think that any single instance of refusal by a member of defendants' body to receive in marriage a girl of plaintiff's caste, especially after betrothal of such girl, would

1869. May 4. S.A. No. 600 of 1869. be a breach of the agreement, unless it were shown that from other causes the responsibility of refusal had been shifted from defendants.

We therefore reverse the decrees of the Courts below, and award plaintiffs the amount claimed as provided for in the agreement with costs throughout.

Appellate Jurisdiction (a)

Referred Case No. 17 *of* 1869.

PALANY ANDY PILLAY.......................*Plaintiff.*

The day mentioned in a bond for the repayment of money as that on which the money is to be repaid is to be excluded from the period of computation under the Limitation Act. The borrower in such case has until the last moment of the day mentioned for the payment, and the right to sue accrues not on but from that day.

1869. May 7. R. C. No. 17 of 1869. THIS was a case referred for the opinion of the High Court by Kristnasawmy Iyer, the Principal Sadr Amin of Tanjore, in three suits instituted by the plaintiff.

No Counsel were instructed.

Three plaints were presented on the part of the plaintiff on the 10th April 1869 for the recovery of money on three simple money-bonds, in all of which the 10th of April 1866 was fixed as the day for repayment of the sums mentioned in them. The period of limitation to suits founded on the bonds (which were not but might have been registered under Clause 7, Section XVI, Act XVI of 1864) was three years. If in calculating the period of limitation the day mentioned in the bonds for repayment were to be included in the computation the suits would be barred, since a period of three years from that date expired on the 9th April 1869.

The following questions were put for the opinion of the High Court;—

I. When does the cause of action accrue in a suit founded on a money-bond, whether on the day mentioned therein as the day on which the money is to be repaid or on the following day?

(a) Present: Scotland, C. J. and Innes, J.

II. If the former, whether or not the day on which the cause of action arose is to be included in the computation in calculating the period of limitation for bringing a suit on such a bond? 1869. *May* 7. *R. C. No.* 17 *of* 1869.

The Court delivered the following

JUDGMENT:—The provision in the Act of Limitations applicable to this case clearly imports that the period of three years is to be computed from the time when the right to sue for the alleged breach of a contract to pay a sum of money first arose. In the present case, the defendant had, under the contract, the whole of the 10th of April 1866, for payment, and there was not a breach of the undertaking to pay until the last moment of that day. Consequently, the right to sue did not accrue *on* but *from* that day and it must be excluded in the computation of the period of three years. This is an answer to both the questions submitted in the case.

Appellate Jurisdiction. (a)

Referred Case No. 16 *of* 1869.

P. VENKATASUBIA *against* K. SIVARAMAPPA.

Process of execution against the person or personal property of a judgment-debtor may be issued on the decree of a Court of Small Causes by a Court in another district. Before issuing such process of execution, the Court receiving the decree is bound to see that the provisions in Sections 286 and 287 of the Civil Procedure Code have been strictly complied with.

The documents required to be transmitted for the purpose of obtaining execution are a copy of the decree and a certificate of any sum remaining due under it together with a copy of any order for execution that may have been passed.

Act XXVI of 1867 requires that copies of the decree and of the order for execution should be stamped. The certificate requires no stamp.

THIS was a case referred for the opinion of the High Court by P. Teroomul Row, the District Munsif of Purghy, in Petition No. 73 of 1869. 1869. *May* 12 *R. C. No.* 16 *of* 1869.

This was an application for the execution of a decree passed by the District Munsif of Kadaray, in the Zillah of Cuddapah, in Suit No. 170 of 1868 on the file of the Small

(a) Present; Scotland, C. J. and Innes, J.

1869. May 12. R. C. No. 16 of 1869.

Cause Side of his Court, against the person and moveable property of the defendant who was alleged to reside within the local limits of the Court of the District Munsif of Purghy in the Zillah of Bellary.

On the 4th January 1869 a letter was received by the District Munsif of Purghy from the District Munsif of Kadaray forwarding a copy of the decree, a certificate that the decree had not been satisfied, and a copy of the application for execution made by the plaintiff (all on unstamped paper), and requesting to have the decree executed by the District Munsif sitting as Small Cause Court Judge. On the 1st February the plaintiff appeared and applied on the regular side of the Court for the execution of the decree against the immoveable property of the defendant, and the execution was being carried out. Subsequently the plaintiff applied, on the Small Cause Court Side, for the execution of the decree against the person and personal property of the defendant.

The following were the questions submitted to the High Court:—

I. Whether a decree passed by a Small Cause Court of one district can be executed against the person or personal property within the jurisdiction of a Court of another district?

II. What are the documents to be submitted by the Court in which the decree is passed to the other Court to which a request for execution is made, and whether such documents are required to be engrossed on stamps?

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—We are of opinion that process of execution against the person or personal property of a judgment-debtor may be issued on the decree of a Court of Small Causes by a Court in another district. Section 47 of Act XI of 1865 enacts that, except as is thereinbefore provided, the provisions of the Code of Civil Procedure shall, so far as the same are or may be applicable, extend to all suits and proceedings under the Act. Now the provisions in the Code relating to the execution of a decree out of the

jurisdiction of the Court which passed it are in their nature and operation very fit to be applied to the decree of a Court of Small Causes, and there is nothing in Sections 19 and 20 of Act XI of 1865, which are the only Sections in the Act providing for process of execution, to render the provisions of the Code in any way inapplicable to the enforcing of decrees against the person or moveable property. They make special provision for immediate execution on a verbal application to the Court passing the decree against the person or moveable property of the judgment-debtor, and for obtaining further execution in any other Court having general jurisdiction against the debtor's immoveable property within as well as without the limits of the jurisdiction of the Court passing the decree.

1869. *May* 12. *R. C. No.* 16 *of* 1869.

Under these Sections, therefore, and the provisions of the Code, the decree of a Court of Small Causes can be executed by another Court against the person or moveable property of the debtor not within the limits of the jurisdiction of the Court passing the decree as well as against the immoveable property either within or without such limits. But, before issuing process of execution against the person or the moveable property, the Court receiving the decree is bound to see that the provisions in Sections 286 and 287 of the Code have been strictly complied with.

On the second question submitted, our opinion is that the documents required to be transmitted for the purpose of obtaining execution against the immoveable property of the debtor are a copy of the decree and a certificate of the sum remaining due under it, and the same when execution is sought against the debtor's person or moveable property, together with a copy of any order for execution that may have been passed.

We are also of opinion that Act XXVI of 1867 requires that the copies of the decree and the order for execution should be stamped,—the copy of the decree under Article 3, and the copy of the order for execution under Article 4, Schedule B. The certificate, we think, requires no stamp.

Appellate Jurisdiction (a)

Referred Case No. 15 *of* 1869.

CHOCKALINGA PILLAI *against* KUMARA VIRUTHALAM.

Several claims, each of which separately is within the Small Cause jurisdiction of a District Munsif, may be joined together and form the basis of a suit in the Small Cause Court.

The plaintiff was the lessor and the defendant the lessee of certain land under an agreement whereby the defendant agreed to occupy the land for two years and to deliver a certain quantity of paddy at four specified periods. Defendant failed to deliver the paddy.

In a suit for rent. *Held*, that although the plaintiff might have sued for each instalment of rent as it fell due, the aggregate of such unpaid instalments should be deemed one cause of action.

1869. *May* 18. *R. C. No.* 15 *of* 1869.

THIS was a case referred for the opinion of the High Court by J. H. Nelson, the Judge of the Court of Small Causes at Combaconum, in Suit No. 102 of 1869.

This was a suit for rent due to the plaintiff by the defendant under a parol agreement, by which the defendant bound himself to deliver to the plaintiff 30 kalams of kadappu paddy in the month of October 1866, 20 kalams of sumba paddy in the month of February 1867, 30 kalams of kadappu paddy in the month of October 1867, and 20 kalams of sumba paddy in the month of February 1868, in consideration of the plaintiff permitting the defendant to occupy certain land from the month of April 1866 to the month of March 1868.

The defendant's pleader objected to the jurisdiction of the Court to entertain the suit on the ground that there were four distinct causes of action, each of which was not cognizable by the Court, and relied on Section 8 of the Civil Procedure Code.

The Judge was of opinion that there were four distinct causes of action, each of them being cognizable by one and the same Court, but that Court, by reason of the amount of the suit, was the District Munsif's, on the Small Cause Court Side, and not the Court of Small Causes at Combaconum.

(a) Present: Innes, and Carmichael, J. J.

The Judge dismissed the suit, subject to the opinion of the High Court, upon the following question :— 1869. *May* 18. *R. C. No.* 15 *of* 1869.

Can this Court try and determine this suit ?

No Counsed were instructed.

The Court delivered the following

JUDGMENT:—The question referred is whether several claims, each of which separately is within the Small Cause jurisdiction of a District Munsif, can be joined together and form the basis of a suit in the Small Cause Court, and we are of opinion that such a suit is cognizable by the Small Cause Court. Although each item in the payments stipulated for in this lease constitutes a debt, the aggregate of such items constitutes but one *cause of action*,—the distinction between an agreement consisting of various items which are intended to form one entire demand on the one hand and several distinct and independent claims on the other being clear and undoubted.

In *Grimbly* v. *Aykroyd* (a) it was held that where one item is connected with another in this sense, that the dealing is not intended to terminate with one contract, but to be continuous, so that one item if not paid shall be united with another and form one entire demand, the plaintiff cannot split these items into separate causes of action, but must sue upon the aggregate amount.

Here plaintiff was the lessor and defendent the lessee of certain lands for the term of the agricultural years 1866-68. The dealing was continuous for two years, and though plaintiff of course might have sued for each item or instalment of rent as it fell due, the aggregate of two or more of such unpaid instalments cannot be divided into two or more causes of action, but must be deemed one cause of action.

(a) 1 Exch. 479.

Appellate Jurisdiction (a)

Special Appeal No. 430 *of* 1868.

M. SESHAIYA.................... *Special Appellant.*

M. GAURAMMA.................... *Special Respondent.*

Plaintiff brought a suit to recover land which had been enjoyed by her husband, the kurnum of a village, but which, on his death, had been given to the defendant with the office of kurnum. The land had been originally attached to the office, but the plaintiff's husband for a long time before his death was enjoying the land as his private property.

Held,—that the miras of the land continued to be attached to the office, notwithstanding that it may have been for some time enjoyed as private property, that the property being annexed to the office was indivisible, and as the Collector, in ejecting the plaintiff, appropriated the land to the office by putting it in the possession of the kurnum whom he appointed in place of the plaintiff's husband, the plaintiff had no right to recover.

1869. *May* 26. *S. A. No.* 430 *of* 1868.

THIS was a Special Appeal against the decision of Vencatadri, the Principal Sadr Amin of Rajahmundry, in Regular Appeal No. 203 of 1867, reversing the decree of the Court of the District Munsif of Peddapur in Original Suit No. 282 of 1866.

The plaintiff brought this suit seeking to recover certain inam land which was held by her late husband as kurnum of the village of Peapur.

The plaint stated that plaintiff's deceased husband Gopolaiya having died in 1859 2 putties and 3 tums of palle mirasi inam land, yielding a sist of rupees 50 a year, was on the plea of the occurrence of a vacancy in the office put in the possession of the then list kurnum by the Collector. The defendant's father enjoyed the same up to 22nd December 1863, and died. The defendant has been enjoying the same ever since.

In his statement, the defendant asserted that under the minutes passed by the Government to the effect that in case of the extinction of Lopayakaribhagasthulu (holders of minor shares) in the mirasi inam lands, the same should be put in possession of such kurnums as were

(a) Present: Scotland, C. J. and Innes, J.

performing the duties of the office, and the land in question was put in possession of the defendant's father in 1859 on the demise of the plaintiff's husband; that the defendant's father and the defendant held the enjoyment thereof on performing the karanikam business ever since.

1869. May 26. S. A. No. 430 of 1868.

The Munsif dismissed the suit on the ground that the plaintiff should have first obtained power from the Zemindar for holding the karanikam office and brought the suit afterwards for recovery of the disputed land connected with the same, but she could not recover the land without holding the karanikam office.

The Principal Sadr Amin, on appeal, reversed the decree of the Munsif. The following is taken from the Judgment of the Appellate Court:—

It has been represented in the plaint that the disputed land was from long time since enjoyed in succession as a lopaykari share by the family of the plaintiff's husband, and the defendant did not raise any objections on the above matter.

Though the said land was originally miras, yet, as the same was not enjoyed for long time by the persons that were performing the duties of kurnum office the Court is of opinion that the defendant does not in any way possess right to the same.

As the said land is one of the mirasi lands included in the zemindary of Pitthapuram, the Collector had no power under any regulations to dispossess the plaintiff of the same on the death of her husband and to put the same in that of the defendant, and the Court recollects that the Inam Commissioner issued circular orders on the 28th March 1860 to the effect that the proprietors of such minor shares are not to be disturbed of their enjoyment.

The Court decides, in reversal of the original decision, that the disputed land should be put in the possession of the plaintiff.

The defendant appealed specially to the High Court against the decree of the Principal Sadr Amin upon the ground that

1869. May 26. S. A. No. 430 of 1868.

No member of the family of a kurnum except the individual performing the duties is entitled to the lands and emoluments attached to the office.

In his return to an issue sent by the High Court, the Principal Sadr Amin found that the land claimed was originally attached to the office of the kurnum of the village, but that prior to the death of plaintiff's husband it had ceased to be attached to that office, and that at the date of his death and for a long period before he was enjoying the land as his private property.

Sloan, for the special appellant, the defendant.

The Court delivered the following

JUDGMENT:—The question in this suit was whether the plaintiff, who, on the death of her husband the kurnum, was ejected by the Collector, had a right to recover this land from the present kurnum who is the son of the person who was appointed to fill the vacancy occasioned by the death of plaintiff's husband.

In return to the issue sent by us, the Principal Sadr Amin has found that the land claimed was originally attached to the office of the kurnum of the village, but that prior to the death of plaintiff's husband it had ceased to be attached to that office, and that at the date of his death and for a long period preceding it he was enjoying the land as his private property.

The village in which the land is situated forms part of a zemindary. Regulation VI of 1831 applies only to unsettled districts, and there is no distinct provision in Regulation XXIX of 1802 (relating to the office of kurnum in settled districts) for securing from alienation the land attached to such offices. But the rules of the Inam Commissioner on which the Principal Sadr Amin relies apply only to the rights of the alieners of service Inam lands in unsettled districts, and land which has been appropriated to the support of a certain office must *prima facie* be held to have been intended to remain attached to it so long as the office continues; and in questions of this nature unless it were clearly shewn or could be presumed that since the original appropriation of the land it had been re-

sumed and re-granted to the claimant or those through whom he claims, it must be held that the land continues to be attached to the office. 1869. May 26. S. A. No. 430 of 1868.

In the present suit no evidence has been offered, and the case of the plaintiff which is simply that the land ceased to be attached to the office of kurnum because it had been enjoyed as a lopayakari share excludes any such presumption. We therefore think that the miras of the land must be held to have continued to be attached to the office notwithstanding that it may have been for some time enjoyed as private property, such enjoyment having been confessedly by members of the kurnum's family by claim of co-parcenery right. The property being annexed to the office was indivisible, and as the Collector who was then in management of the zemindary in ejecting plaintiff appropriated the land to the office by putting it in the possession of the kurnum whom he appointed in room of plaintiff's husband, plaintiff can have no right to recover.

On the above grounds the decree of the Principal Sadr Amin must be reversed and the plaintiff's suit dismissed, and the plaintiff will bear the costs of suit in the original and appeal stages and in this special appeal.

Appellate Jurisdiction (a)

Special Appeal No. 514 *of* 1868.

S. NAMASEVAYAM PILLAY ....*Special Appellant.*

ANNAMMAI UMMAL ....*Special Respondent.*

The plaintiff, the divided brother of the defendant's deceased husband, sued to obtain a declaration of his independent legal right to betroth the infant daughters of his deceased brother by the defendant to persons of his own choosing without the interference of the defendant and of her obligation to accept any persons whom he may select and provide for the celebration of their marriages.

Held,—That the exclusive right sought to be enforced by the plaintiff was not warranted by Hindu law, apart from the legal position and rights of the defendant as the guardian of her daughters and possessor of her husband's property, which however presented still stronger grounds of objection to the plaintiff's claim.

THIS was a Special Appeal against the decision of F. S. Child, the Civil Judge of Tinnevelly, in Regular Appeal No. 290 of 1867, confirming the decree of the 1869. June 2. S. A. No. 514 of 1868.

(a) Present: Scotland, C. J. and Innes, J.

1869. June 2. S. A. No. 514 of 1868.

Principal Sadr Amin's Court of Tinnevelly in Original Suit No. 76 of 1866.

Mayne, for the special appellant, the plaintiff.

The Advocate General and *Sloan*, for the special respondent, the defendant.

The facts fully appear from the following

JUDGMENT:—The plaintiff in this case is the brother of the defendant's deceased husband and was divided from him, and he seeks by the suit to obtain a declaration of his independent legal right to betroth the infant daughters of his deceased brother by the defendant to persons of his own choosing without the interference of the defendant, and of her obligation to accept any persons whom he may select and provide for the celebration of their marriages. Both the Lower Courts have pronounced the plaintiff's claim to be unreasonable, and without legal authority to warrant it, and have decreed the dismissal of the suit. The plaintiff has appealed from the decree of the Civil Court, and the question for determination is whether he is entitled to a declaration of the exclusive general right which he sues for.

The authorities relied upon in argument as directly supporting the alleged right rest on a text of *Yajnavalkya* which, as given in the remark of Mr. Colebrooke to be found in 2 *Strange's Hindu Law* 28, is "The father, "paternal grand-father, brother, kinsman, remote relations "(Saculya) and mother are the persons to give away a "damsel—the latter respectively on failure of the preceding."

The version given in the *Digest*, Book 5 Ch 3, Section CXXXV is ; "In the disposal of a girl the father, the pater-"nal grand-father, the brother, a kinsman or the natural "mother shall be consulted in the order here specified ; upon "the death of the first the right of giving away the damsel "devolves on each of the others successively provided they "be of sound understanding." It cannot be gainsaid that this text in its literal acceptation does import an individual right of betrothal in the order of succession declared, and we do not see any sufficient ground on which it can be held to be applicable only to the daughters of an undivided

member of a family. In the *Digest* and in Vol. 1 p. 36 of *Sir Thomas Strange's Hindu Law* it is treated as of general application. But it does not necessarily import the absolute exclusive right which the plaintiff seeks to have declared, namely, the right to betroth his brother's daughters to any person whom he may hereafter choose without reference to their mother and even against her feelings and wishes. Therefore in forming our judgment as to its true effect and force we must be governed by a consideration of the reason and principle on which it rests and the natural rights of the defendant as a mother and her legal position and capacities as a widow.

In principle and reason the duty enjoined on the male relatives of the father is not, it appears to us, founded upon the incapacity of a woman to perform the rights required by the Hindu system of rules relating to the marriage ceremony. Among the rites at the marriages of Brahmins as set forth in *Mr. Colebrooke's 3rd Essay on the Religious Ceremonies of the Hindus* (See 1st Vol. of his Miscellaneous Essays, page 203) there are some to be performed by the bride's father which (as was urged for the appellant) the mother could not in person perform instead of the father, and perhaps the same may be said of the rites practised at the marriages of members of some of the other castes and sects. But we have no doubt that the mother would be quite as competent to depute a male kinsman of her husband to act for her on such an occasion as on the occasion of the performance of her husband's exequial ceremonies. This too the very ordinance itself recognizes by placing the mother in the order of persons who are charged with the duty of betrothal enjoined by it. The true reason for the injunction it appears to us was the state of dependence in which women were formerly placed by the law even where as widows they had succeeded to the possession of their husband's estates, and that certainly does not warrant the ordinance being carried to the length of declaring the right claimed by the plaintiff, if what appears to us to be the reasonable and proper view of the law relating to such state of dependance be taken. It was, according to the strict letter of the most ancient precepts, a state of submis-

1869. June 2. S. A. No. 514 of 1868.

sion and reliance, not servility, inculcated for the protection and control of wives and widows in regard to the strict morality of their lives and the due observance of religious duties, and also in the management and use of property for which they were rendered unfitted by the rigid lives of retirement and austerity which they were compelled to lead. *Manu*, (Ch. 9 Sl. 23) declares: "Day and "night must women be held *by their protectors* in a state "of dependence. Their fathers protect them in childhood "their husbands protect them in youth, their sons protect "them in age." And again (Ch. 5 Sl: 148). "In child-"hood must a female be dependent on her father, in "youth on her husband, her lord being dead on her "sons; if she have no sons on the near kinsmen of her "husband, if he left no kinsmen on those of her father, "if she have no paternal kinsmen on the sovereign: a wo-"man must never seek independence."

Protection and guidance and submission thereto are the duties thus enjoined, and seeing that women of full age are throughout the law treated as of legal capacity to act to a limited extent, it is a reasonable implication that those relative duties were intended to be performed by their appointed protectors with a due regard to the feelings and wishes of those under protection, whether wives or widows, within the sphere of their proper duties and the legitimate limits of their proprietary rights. In short the state in which it appears to us women were intended to be placed was simply that of protective guardianship very similar probably to the *legitima tutela muliebris* exercised under the Roman Law before the time of Justinian over women of full age and *sui juris* which, recognizing their legal capacity to act, required the advice and interposition of their tutors to give effect to their transactions. See 1 *Colquhoun's Roman Civil Law*, Sections 741, 742.

In this view it would obviously be doing violence to the reason and principle on which the text of *Yagnyavalkya* is based to put the construction upon it necessary to support the plaintiff's present claim, for it is beyond question that a voice in the betrothal of a child of tender years is peculiarly a mother's right and duty. The dictates of human natural affection impel her to feel deep

concern in such an event and teach that her feelings and wishes should be fully consulted, and the whole spirit and policy of the Hindu Law seems to us to accord to every mother the perfect enjoyment of this natural right.

1869. *June* 2. *S. A. No.* 514 *of* 1868.

But the strictly legal position and rights of the defendant as the guardian of her daughters and the possessor of her husband's property present still stronger grounds of objection in opposition to the plaintiff's claim. It was conceded in argument that the law has always recognized a mother's right to be the guardian of her minor son or daughter upon the death of her husband in preference to his kinsmen. Such a recognition is very inconsistent with the disposal of her daughters in marriage by her husband's brother or other relation without reference to her, and tends forcibly to support the view we have expressed with respect to the state of dependency imposed on women. Thus the recognition of her position as guardian militates against the law *ever* having given the exclusive right contended for. But now that the texts declaring such state of dependency have become as did the Roman Law relating to the *tutela muliebris* obsolete, and a woman acts independently as guardian, and such acts are perfectly legal, it would amount to almost an absurd contradiction to hold that although competent and capable to be guardian a mother has no right to be consulted in the choice of a husband for her daughter.

Again, as the possessor of a life estate by right of legal succession in all her husband's property the defendant is as has been well settled absolutely *sui juris* (*Kamavadhani Venkata Subbaiya* v. *Joyasa Narasingappa*, III *Madras H. C. Rep.* 116,) and is the person on whom the law casts the duty of determining what is a proper provision for her daughter's marriages and providing the means required to defray the expenses of their celebration. The independent right and discretion which she is competent to exercise in that respect she cannot be called upon to exercise until the choice of bridegroom has been made, and her reasonable discretion in the matter must be guided to some extent by the choice made. It seems to us to be necessarily incident to this absolute capacity to act that in making the choice of a bridegroom the defendant should be consulted.

1869. June 2. S. A. No. 514 of 1868.

Upon reason and principle, therefore, and the application of the existing law in regard to the independent position of the defendant both as guardian and proprietor of the estate derived from her husband we come to the conclusion that the law does not warrant a declaration of the absolute right set up by the plaintiff. We are of opinion that the duty was enjoined on the husband's kinsmen in order to ensure the making of a suitable provision for the betrothal of daughters before reaching the age of puberty, just as it is declared to be their duty in the case of sons to provide for the several ceremonies required to perfect the regeneration of a twice-born man. It appears to be so treated by *Jaganatha* in the *Digest* Sections 303 and 113, and that they were left to perform it like all other "auspicious" family ceremonies in harmony if possible with the mother and other members of the family. If on a choice being made of a person in every way suitable to be affianced a mother without sufficient cause improperly refused to accept him and obstructed the betrothal, a suit to compel her to allow the ceremony to take place, and, if she was chargeable, to provide means for its celebration, would probably be successful. But no Court, we think, would be justified in granting such relief if the mother's refusal and resistance were because of serious objections to the person chosen or for other good and sufficient cause, nor, we think, would the betrothal of a daughter with an unobjectionable person of the mother's selection be restrained at the suit of the brother or other kinsmen of the father who had been consulted by the mother and had without any sufficient cause objected to the betrothal. It would seem from the express provision made by the law for the choice of a husband by a girl herself in case of neglect on the part of her relatives of their duty to betroth her for three years from the time she became marriageable (*Manu* Ch. IX Sl. 90, 91, 1 *Strange's Hindu Law* 36) that the duty does not amount to an enforceable legal obligation, and the effect of restraining the betrothal in such a case would probably be to aid in thwarting betrothal before puberty, the very purpose for which the duty was enjoined. We do not find in the cases which were referred to in argument anything to assist the decision of the present question.

except the recognition of the right of the grand-mother as guardian to dispose of a minor daughter with the consent of her male paternal relative, expressed in the Judgment of the Court in *Maharanee Ram Causi Koeri* v. *Maharanee Soobh Koeri, Wyman's Civ. and Rev. Reports*, p. 244 Vol. III, which certainly favors our view of the plaintiff's claim. For these reasons the decree appealed from must be affirmed and the appeal dismissed with costs: 1869. *June* 2. *S.A. No.* 514 *of* 1868.

Appellate Jurisdiction (a)

Special Appeal No. 500 *of* 1868.

K. VENKATRAMANNA.................. { *Special Appellant.* *(1st Defendant.)*

K. BRAMMANNA SASTRULU and another........................ { *Special Respondents.* *(Plaintiffs.)*

Upon a division of family property, the parties to the division entered into an agreement that the property of any one of the parties to the agreement or their heirs dying leaving no issue should not be sold or transferred as a gift, but should on his death be divided by the other shareholders.

In a suit by one of the shareholders to recover the share to which the plaintiff was entitled under the agreement from the defendant a purchaser from the son of the person to whom the property was allotted upon the division,

Held, that an estate cannot be made subject to a condition which is repugnant to any of its ordinary legal incidents and that the power of disposition, being a legal incident of the estate which passed to the vendor, could not be taken away by the agreement.

THIS was a Special Appeal against the decision of H. Morris, the Civil Judge of Rajahmundry, in Regular Appeal No. 392 of 1867, reversing the decree of the Court of the District Munsif of Rajahmundry in Original Suit No. 120 of 1866. 1869. *June* 8. *S. A. No.* 500 *of* 1868.

Sloan, for the special appellant, the first defendant.

Snell, for the special respondents, the plaintiffs.

The plaintiffs sued to recover their shares of family property.

The plaintiffs alleged that the 1st plaintiff's undivided brother Bhadrayza died issueless on the 5th March 1863, and that the defendants took possession of the whole pro-

(a) Present: Scotland, C. J. and Innes, J.

1869. June 8. S. A. No. 500 of 1868.

perty of the said Bhadrayza inclusive of that which ought to be divided, according to the deed marked A executed by both parties' ancestors on 16th June 1817, into three shares, one to the 1st plaintiff, another to the 2nd plaintiff, and the third share to the 1st defendant and his brothers.

The 1st defendant in his written statement asserted that the deed was a fabricated one and that it was invalid according to Hindu Law; that the disputed property was, under the deed of sale, dated 22nd August 1862, delivered into his possession by Bhadrayza, the proprietor, and had since been in his own enjoyment.

The District Munsif found that the deed marked A was duly executed, and in favor of the sale set up by the 1st defendant, and he dismissed the suit. With reference to the contention of the 1st defendant that the deed marked A was not valid, the Court made the following obsevations in the Judgment:—

The condition that the property of the deceased must be divided between the survivors is not against law.

The condition that any of the executors of this document who should be without any issue, natural or adopted, should have no power to dispose of the property by sale or gift, is binding only on the parties who executed the document, but is not binding on their heirs. Hindu Law has no power to restrain a person from disposing as he likes by sale or gift of his real property which ought to descend to his sons and other heirs who have an equal right with him thereto.

The plaintiffs appealed against this decision for the following reasons:—

Because the bill of sale had not been fully proved.

Because exhibits IV and V had not been proved.

Because the kararnamah A is valid, Bhadrayza not having objected to it.

The Civil Judge observed as follows:—

The family is indisputably divided, all parties allowing that such is the case. I see no reason to doubt the genuineness either of the kararnamah A or of the bill of

sale No. I. The only point for determination, therefore, is, whether the conditions mentioned in A are valid, the property of Kommu Bhadrayza who died without issue, being subject thereby to be divided into three shares between the plaintiffs and the 1st defendant; or whether he was at liberty to transfer it all by sale to the 1st defendant. I am of opinion that the terms of the kararnamah are binding on the heirs of those who executed it as well as on themselves.

The kararnamah was executed in June 1817, at the time of division by Kommu Peru Bhotlu and the widow of deceased brother on behalf of her infant son, the present 2nd plaintiff, in favor of two other brothers Pedda Viriah, adoptive father of the 1st plaintiff, and Chellamiah, father of the 1st plaintiff and the deceased Bhadrayza, who are said to have executed a similar counter-kararnamah. The clause now under consideration runs thus.—" If any one of us or of our heirs be without any manner of issue, either natural or adopted, it is agreed that the surviving sharers, after his death, shall divided his (real) property without his having the power to give it away or to sell it." In violation of these terms, Bhadrayza, a son of one of the parties, who had no issue, before his death sold the share which he had inherited from his father to the 1st defendant, who, as the son of another of the parties to the above agreement, was entitled to a share in it without purchase. I do not see anything illegal in the conditions. Relations at a division are not debarred by law from making whatever stipulations they please in order to keep the property in the family, provided that no absent member of the family be defrauded.

The Civil Judge reversed the decision of the District Munsif and gave judgment in favor of the plaintiff. The decree directed that the real property left by Kommu Bhadrayza be divided into three equal portions between the 1st plaintiff, the 2nd plaintiff, and the 1st defendant and his brother, according to the terms of the kararnamah.

The defendant presented a Special Appeal to the High Court of Judicature at Madras upon the ground the kararnamah was not valid in law.

1869. June 8. S.A. No. 500 1868.

The Court delivered the following

JUDGMENT:—This suit is founded upon a kararnamah under which the plaintiffs claim to share with their paternal cousins, the 1st defendant and his brother, the property which was allotted on a family division to one of the co-parceners, and was after his death enjoyed by his son Bhadrayza who died without issue, and shortly before his death made a *bonâ-fide* sale of the property to the 1st defendant. The kararnamah was entered into between the co-parceners contemporaneously with the division, and the single question to be determined is whether the provision made therein against a disposition of the allotted shares invalidated the sale by Bhadrayza to the 1st defendant, as the Civil Court has decided in reversal of the decree of the Court of First Instance.

The kararnamah, after reciting that each co-parcener had taken possession of his share according to the list prepared upon the division and that the arrangements therein had been determined upon for the conduct of affairs in future, contains a stipulation that if by an act of Providence or Government loss should occur at any time to the lands divided, the parties or their heirs should again divide equally, and then follows the provision in question:—" We have " also resolved that the property of any one of us or our " heirs who has no natural or adopted son or any other " issue should not be sold or transferred as a gift but should " on his death be divided by the other shareholders." The obvious purpose of these stipulations was to frustrate indefinitely the right of alienation which was a legal incident of the absolute estate in severalty created by the partition; in effect to convert the estate in the case of each sonless or issueless possessor into a mere life enjoyment. But this we are of opinion they were inoperative to do. Although the parties might by mutual contract impose on themselves an obligation restrictive of their proprietary rights, they could not, we think, by a collateral agreement, annex hereditarily to each separate absolute estate acquired by the division a condition which was incompatible with the beneficial rights incident thereto. It is a sound principle and one from its very nature of general application that an estate cannot be made subject to a condition

which is repugnant to any of its ordinary legal incidents, and we are not aware of anything in the Hindu Law which would permit of a departure from that principle. But we learn from *Sir F. Macnaghten's Considerations on Hindu Law, p.* 327, that it has been decided in accordance therewith by the Supreme Court at Calcutta that the possessor of property could not put a restraint upon the exercise by his descendants of the right of partition given by the Hindu Law. Here the power of disposition was unquestionably a legal incident of the separate estate which passed to Bhadraiyza partly on his birth and partly by inheritance on the death of his father, and to hold that it could be indefinitely taken away by a condition of this kind would be abrogating the law by the agreement. 1869. *June* 8. *S. A. No.* 590 *of* 1868.

We are therefore of opinion that the stipulation against alienation in the kararnamah was not binding upon Bhadraiyza, and, as the sale by him to the 1st defendant is found to have been made *boná fide*, the plaintiffs' claim fails. Consequently the decree of the Civil Court must be reversed and that of the Court of First Instance dismissing the suit affirmed. The defendant's costs in this Court and the Civil Court must be paid by the plaintiffs.

Appellate Jurisdiction (a)

Special Appeal No. 619 *of* 1868.

ARCHAKAM SRINIVASA DIKSHATULU... *Special Appellant.*
UDAYAGIRY ANANTHA CHARLU...........*Special Respondent.*

Plaintiff sued to establish his right to receive certain honors in a Temple as appertaining to his office of Officiating Priest of the Temple, and to recover damages for the invasion of his right. In a former suit between the predecessor of the plaintiff and the 1st defendant, the claim to sit at the right side of the idol at festivals was admitted, but the right to receive a cake on the same occasion was disallowed.

Held, that the claim of the plaintiff, so far as it sought to establish the plaintiff's right, was *res judicata*.

Held, also that the suit of the plaintiff to recover damages for the invasion of the right of the plaintiff appertaining to an office in the Temple was one which it was competent to the Civil Courts to entertain.

THIS was a Special Appeal against the decision of E. F. Eliott, the Acting Civil Judge of Chittoor, in Regular Appeal No. 12 of 1867, reversing the decree of the Court 1869. *June* 8. *S. A. No.* 619 *of* 1868.

(a) Present: Innes and Carmichael, J. J.

1869. June 2. S. A. No. [illegible] of 1868.

of the District Munsif of Tirupaty in Original Suit No. 71 of 1867.

The plaint set forth that the late Pattu Sheshammal, who was entitled to the Archava-mirasi (the right of officiating as a priest, in the Tripati Strikodanda Ramaswmi Devastanum, conveyed the mirassi right to the plaintiff and he has been performing the duties of the said office; that the 1st defendant pretending that he is entitled to some of the privileges and honors attached to the mirassi right accorded during the celebration of the Bramauthswum at night, illegally appropriated them during the first two days of the festival in the year Kalayukti (1858); that on learning these proceedings, Sheshammal represented the matter to the manager of the pagoda, and he decided on the 14th March 1858 that the said honors were due to Seshammal, and accordingly they were paid to her during the remaining days (of the festival); that subsequently the appropriation of these honors had been disputed, sometimes they were accorded to the plaintiff, and sometimes to the 1st and 2nd defendants on their claiming them; that during the Bramauthswum festival in March 1866, the honors paid during the night were not accorded by the present manager the 4th defendant to the plaintiff but to the 1st defendant. The plaintiff therefore sued for a decree declaring him entitled to enjoy the said honors undisputed and to the income of rupees two attached to them and for recovery of the past income valued at rupees two.

The 1st defendant in his written statement stated that the honors accorded during the night in dispute did not belong to the plaintiff; that the income attached to them was not due to him; that the 1st defendant's ancestors and himself had been enjoying the honors for nearly a period of 50 years; that the plaintiff's ancestors had never enjoyed them, that his (1st defendant's) enjoyment was confirmed by the decree of the Court in Suit No. 369 of 1827.

The District Munsif, deciding that the suit was barred by the Act of Limitation, dismissed the suit.

Upon appeal, the Civil Judge, having remanded the suit for the trial of further issues, reversed the decision of

the Munsif, and gave plaintiff a decree. The following is extracted from the Judgment of the Civil Judge:— 1869. June 8. S. A. No. 619 of 1868.

For the suit to be barred, the plaintiff must have been out of enjoyment for six years prior to the institution of this suit, and there must have been a positive adverse enjoyment by defendants. Now this has not been established at all—plaintiff's witnesses all establish his enjoyment up to 1866, but, putting them aside, defendant's own witnesses prove enjoyment by plaintiff within two four and six years of the institution of this suit, which is directly contrary and opposed to defendant's plea. This is the evidence at the original hearing when there was no special issue recorded on the point of law, but when it was recorded and evidence obtained upon it, there was nothing else than an affirmation on one side against a denial on the other as might be expected.

Upon the other issues raised in the suit, the Civil Judge decided in favor of the plaintiff.

The 1st defendant appealed specially to the High Court against the decree of the Civil Judge upon the following grounds:—

I. The plaintiff's claim is barred by Section 2, Act VIII of 1859, and by the Law of Limitation.

II. The Civil Court cannot take cognizance of suits of this nature.

Rama Row, for the special appellant, the first defendant.

Miller, for the special respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—In this suit plaintiff sought to establish his right to receive certain honors in the temple of Tirupaty Sri Kodanda Ramaswamy Devastanum as appertaining to his office of officiating priest of the temple, and to recover damages for the invasion of his right by 1st and 2nd defendants. The District Munsif dismissed the suit, but the Civil Court on appeal reversed the decision of the District Munsif and decreed in favor of plaintiff's entire claim.

1869. June 8.

S. A. No. 319 of 1868.

In this special appeal we have to consider,

1st. Whether this is a suit of which the Civil Court can properly take cognizance.

2nd. Whether plaintiff's claim is barred by the Law of Limitation.

3rd. Whether the whole claim, or any part thereof, has not already prior to the institution of this suit been heard and determined by a competent Court and so became incapable of forming the subject of an adjudication in the present suit.

In regard to this third point, assuming for the present that the Civil Courts are competent to entertain such suits, we find that as regards the right in dispute plaintiff's claim was under adjudication in Original Suit No. 369 of 1827 and Appeal Suit No. 34 of 1828. In the appeal suit the claim of plaintiff's predecessor as against 1st defendant to sit at the right side of the idol at festivals was admitted, but that to receive a cake on the same occasion was disallowed. These are precisely the claims now put forward, and as plaintiff claims through the person in whose interest that decision was pronounced, it is clear that, in so far as the present suit is for the establishment of the right of plaintiff, the matter is *res judicata*. The other part of his claim, however, is for damages for the invasion of what he claims as his right in 1866. But here again the right claimed divides itself into that relating to the position of plaintiff at festivals and that relating to the cakes which he claims to be entitled to receive. As far as damages are claimed on account of the cakes withheld, plaintiff's suit, if otherwise sustainable, cannot be upheld, because, as already mentioned, the decree in Appeal Suit No. 34 of 1828 between the same parties disallowed this claim. The other questions therefore for our consideration are narrowed to their bearing on the plaintiff's claim to damages for the invasion of his right to sit on certain occasions on the right side of the idol.

We do not think that plaintiff's claim in this respect is barred by the Law of Limitation. It is found by the Appellate Court that plaintiff had not been wholly kept out of possession of the right claimed for the period of

1869 June 8. S. A. No. 619 of 1868.

six years prior to the institution of the suit, and the fact of no steps having been taken to enforce the former decree cannot affect the question, because, the right being once established, every obstruction of it gives rise to a cause of action for damages for the trespass.

Then as to the question whether the Civil Courts are competent to entertain suits of this nature. We think that they are. There is here no question of the regulation of religious ritual as was the case in Special Appeal No. 94 of 1861, or of a right to votive offerings or payment of respect by the wardens and worshippers of the temple, such as was claimed in the case reported in *Madras High Court Reports*, Vol. I, page 301. The question here relates to a right appertaining to an office in the temple, and the decision of the High Court in Original Suit No. 79 of 1865 (not reported) bears us out in the conclusion which we have arrived at as to the jurisdiction of the Civil Courts in suits in which a right is claimed in connection with religious worship which is not a mere matter of religious ceremonial, and which does not trench on the rights of the worshippers at a temple to show to the claimant or to withhold from him reverence or respect.

With the modification therefore already noticed we confirm the decree of the Civil Court, but as part of the claim has been disallowed, we think the special appeal should be dismissed without costs.

Appellate Jurisdiction (a)

Special Appeal No. 633 *of* 1868.

K. SUBBAIYA......................*Special Appellant.*

K. RAJESVARA SASTRULU... ... ...*Special Respondent.*

In a suit by a co-parcener to enforce a division of family property it is necessary, in order to constitute the bar provided by Clause 13 Section 1 of the Limitation Act, to prove possession and enjoyment of the property as the possessor's own separate property to the absolute exclusion of the person suing to enforce the right to share for twelve years computed either "from the death of the person from whom the property alleged to be joint is said to have descended" or "from the last payment to the plaintiff or any person through whom he claims by the person in the possession or management of such property or estate on account of such alleged share." The question of fact whether there has been such exclusive possession or enjoyment must be decided upon the evidence in each case and may be satisfactorily proved although there may be no evidence of an express refusal to allow the plaintiff any part of the benefits of the joint property.

1869. June 15. *S. A. No.* 633 *of* 1868.

THIS was a Special Appeal against the decree of L. Forbes, the Civil Judge of Nundial, in Regular Appeal No. 12 of 1866, reversing the decree of the Court of the District Munsif of Kurnool in Original Suit No. 177 of 1865.

The plaintiff, elder brother of defendant, sued for a division of family estate, and sought to recover one-eighth of the lands set out in the plaint, being his moiety, together with rent.

The defendant alleged that of the lands in issue some were self-acquired; that he had been in exclusive independent possession, and as plaintiff had for over thirty years lived in another village enjoying other lands, and had never occupied or had any interest in the lands, the claim was barred.

The Munsif made a decree in favor of the plaintiff.

Upon appeal the Civil Judge reversed the decree upon the ground that the suit was barred. The following is taken from the Judgment of the Civil Judge :—

I am clearly of opinion that this claim is barred by lapse of time. It is simply a question upon the facts whether possession has been adverse for a period exceeding that within which a suit may be brought. It constantly,

(a) Present : Scotland, C. J. and Innes, J.

of course, happens that relatives, especially brothers, are content to live on undivided, in co-parcenership, and I conceive that as regards them individually, so far at least as concerns Southern India, where birth does not give a starting point, no lapse of time would bar a suit for division, unless the holder were shown to have held exclusively and on the footing of separate ownership, and the claimant had been out more than twelve years.

The father of the parties died in 1834, and from that time, or for upwards of thirty years, (plaintiff confesses to twenty-eight years), plaintiff has lived in another village Timmapuram with his wife's relatives in enjoyment of other property. Well then has plaintiff shown that he has ever been either actually or constructively in possession of the plaint lands? Has he shown that he has ever exercised any act of ownership, contributed anything to, or derived anything from, the property? He states in his appeal petition that, as the ancestral property was not sufficient to provide maintenance for all, he left it in possession of the others. Seventy-seven out of the eighty-two plaint lands are in Kumbalapalli, and it is important to notice that in the old Paimaish Talaband Jamabundy and Faisalate Accounts the one-fourth share of these, of which a moiety is now sought to be recovered, stands in the name of the defendant the younger.

I do not propose to go into the direct evidence offered regarding the partition. It would be a manifest injustice if, after being out of possession for more than thirty years, and having during that time derived no benefit from, and taken no part in the management of, the property, plaintiff could now come in and say to defendant, "All this you admit to be ancestral—I demand my share: if we are divided it is for you to prove it." Defendant is entitled to reply "No—I have held all these years independently of you, and the old accounts are in my favor: it may be true—I cannot by direct evidence prove the actual partition, but I stand upon my exclusive possession, and I plead the limitation bar; it now lies on you to prove joint interest—not on me to prove the division." If Clause 13 does not apply here, can it ever have any application?

1869. June 15. S. A. No. 633 of 1868.

Being of opinion then that the suit is barred, I must, in reversal of the Lower Court's decision, decree that the claim be dismissed.

Plaintiff presented a special appeal to the High Court against the decree of the Civil Judge on the grounds that

I. The status of non-division being found by both the Lower Courts as a fact, the onus of proving hostile possession was clearly on the defendant who had failed to satisfy the burthen.

II. The facts found by the Munsif and not disputed by the Civil Judge proved that there was no hostile possession by the defendant as against the plaintiff till 1862.

III. There is no evidence on record to shew that prior to 1862 there was any refusal by the defendant to give plaintiff's share.

Miller and *Kuppuramasamy Sastry*, for the special appellant (plaintiff.)

Venkatapathy Row, for the Special Respondent (defendant)

The Court delivered the following

JUDGMENT:—This is a suit between two brothers for a partition of family property in the possession of the defendant, the plaintiff being the elder of the two; and the sole question raised in the appeal is whether the Lower Appellate Court was wrong in dismissing the suit on the ground that it had been barred by Clause 13, Section 1 of the Act of Limitations. There is no doubt that the plaintiff has been out of possession of the property without deriving any benefit from it since the death of his father in 1834, and the objections urged on his behalf against the decree are first, that some proof of an express refusal by the co-parcener in possession to allow the plaintiff any part of the benefits of the joint property on account of his share or of the repudiation of the plaintiff's right to share as a co-parcener is necessary to constitute the bar under the clause, and that no evidence of either requisite appears in the record: secondly, that, as by the law which governs here, ancestral property does not pass by inheritance from

a father to his sons, the earlier provision in the clause as to the computation of the period of limitation "from the death of the person from whom the property alleged to be joint is said to have descended" renders it inapplicable to this suit.

1869. June 15. S. A. No. 633 of 1868.

With respect to the first point, it is clear that such positive proof as that contended for is not essential to the bar. It has been distinctly laid down by this Court in the cases of *Govinda Pillay* v. *Chedambara Pillay*, 3 *Madras High Court Reports*, 99, and *Abbakku* v. *Ammu Shettati*, 4 *Madras High Court Reports*, 137, that what is necessary in order to constitute the bar is proof of possession and enjoyment of the property as the possessor's own separate property, to the absolute exclusion of the person suing to enforce the right to share, for twelve years computed from either of the events mentioned in the clause, so as to rebut the presumption of constructive joint possession arising out of the relation of co-parceners; and in that construction of the clause we concur. The bar then depends upon the question of fact whether there has been such exclusive possession and enjoyment, and that must be decided upon the circumstances in evidence in each case, and may be satisfactorily proved although there should be no evidence of an express refusal or repudiation of the kind contended for.

In the present case the Civil Court has distinctly found separate possession to the absolute exclusion of the plaintiff, and we have simply to see that there is evidence in the record from which the Court might reasonably come to that conclusion; and such evidence there undoubtedly is. It appears that for about 30 years the plaintiff had been living with his wife's relatives in the enjoyment of other property in a village at some little distance from the defendant, and there is clear evidence to the effect that during that period his interest in the property had not been in any way acknowledged or regarded, nor had he assisted or interfered with the defendant in the management of the property or attempted to interfere until about 1860 when the disputes arose which led to this suit; that a considerable portion of the property

1869. June 15. S. A. No. 633 of 1868.

had been all along entered in the paimash and other public accounts in the defendant's name alone although he was the younger brother; that he had been treated by the Officers of the Government as sole owner; had from time to time let out portions of the property in his own name; and in all other respects dealt with and beneficially enjoyed it as exclusively his own, and had in 1855 recovered some of the land from relatives who had improperly taken possession of it by legal proceedings taken in his own name as the sole owner; and that all these matters were well known to the plaintiff.

The appellant's second objection, we are of opinion, is not maintainable. The difficulty attending the application of the first branch of the provision as to the computation of the period of limitation was pointed out by the learned Judges who decided the case of *Govinda Pillay* v. *Chedambara Pillay*, 3 *Madras High Court Reports*, 99, and we agree in the view which is expressed in their judgments, that as by the well-established law in Madras the original acquirer is the only person from whom ancestral property can be said to have descended in its entirety that branch of the provision can have complete application to but few suits for partition. It seems to us that, subject to the question of fact which we have just been considering, the provision admits of application to cases in which neither the claimant suing nor any person through whom he claims had received from the person holding the property any benefit on account of his alleged share since the death of the self-acquirer; but that whenever ancestral property has been enjoyed by one or more generations of the family it is altogether inapplicable as a bar to the maintenance of a suit instituted after twelve years from the death of the original acquirer by a descendant of the member or one of the members of the family who last enjoyed or shared in the enjoyment of the property; and the present is such a case.

But this inapplicability of the first part of the provision does not limit the operation of the second part which provides for the computation of the period of limitation "from the date of the last payment to the plaintiff or any "person through whom he claims by the person in the

"possession or management of such property or estate on "account of such alleged share." Reading the word "payment" in the sense which we consider the reasonable construction of the clause shews that it was intended to have, namely, as importing anything given or allowed to be enjoyed on account of the share sued for, the second part of the provision is, we think, applicable to this suit and to every case in which such a benefit can be shewn to have been received by the claimant or the co-parcener through whom he claims however long the property may have been ancestral. From the date of the last benefit received, the period of twelve years is computable; but to establish the bar there must be proof of absolutely exclusive enjoyment for that period. In the present case, the receipt by the plaintiff of a portion of the produce of the property on account of his share ceased a short time after his father's death in 1839, and the Civil Court has found that from that time the property has been enjoyed adversely to the plaintiff. For these reasons the decree appealed from will be affirmed with costs.

1869. June 15. S. A. No. 633 of 1868.

Appellate Jurisdiction (a)

Special Appeal No. 113 *of* 1869.

UNICHA KANDYIB KUNHI KUTTI NAIR............	*Special Appellant (Plaintiff.)*
VALIA PIDIGAIL KUNHAMED KUTTY MARACCAR and 5 others............	*Special Respondents (1st to 4th and 9th and 10th Defendants.)*

The 15th clause of Section 1 of Act XIV of 1859 does not require that the acknowledgment should be given to the mortgagor.

In a suit to redeem, the plaintiffs produced a mortgage, the genuineness of which the defendants denied, but they produced a mortgage from the plaintiff's ancestors to their ancestors. The Principal Sadr Amin made a decree for the restoration of the lands according to the terms of the mortgage produced by the defendants. The Civil Judge reversed the decision.

Held, in special appeal, that the Principal Sadr Amin was justified in making the decree which he gave.

THIS was, a Special Appeal against the decision of G. D Leman, the Acting Civil Judge of Tellicherry, in Regular Appeal No. 262 of 1867, reversing the decree of the Court

1869. June 18. S. A. No. 113 of 1869.

(a) Present; Bittleston and Carmichael, J. J.

of the Principal Sadr Amin of Tellicherry in Original Suit No. 5 of 1867.

1869. June 18.

S. A. No. 113 of 1869.

The suit was brought to recover three parcels of land alleged to have been demised on an otti of 1,000 fanams in 991 (1816) by plaintiff's late karnavan Ookan Nair to Kotekul Kuttiassan, the deceased karnavan of 1st and 2nd defendants, who transferred their right to the family of 3rd and 4th defendants.

Third defendant stated that his karnavan purchased the jenm of the plaint lands at some period which he is unable to state, as the jenm deed was carried off by junior members of his tarwad, one of whom (9th defendant) now pretends that she procured an assignment of the right which the tarwad possessed in the lands from a deceased karnavan, and that he (3rd defendant) has filed a suit (15 of 1865) to recover possession of these and other tarwad lands.

Fifth defendant asserted a simple lease over the western half of the land II derived from 10th defendant.

Sixth defendant asserted a simple lease over the remaining half of the land II derived from 10th defendant and claimed improvements.

Seventh defendant stated that he held a simple lease over the land I of the 9th and 10th defendants and had built a shop which was undervalued in the plaint.

Ninth and 10th defendants, members of 3rd defendant's tarwad, stated that the otti demise sued upon was untrue, that the land I was originally hypothecated to one Ali in 958 (1782-3) for 500 fanams whose heir Kunhi Moidin sold it in 999 (1823-4) to their karnavan; that in 971 (1796-7) plaintiff's karnavan granted a kanom of 1,800 fanams over all the three lands to the karnavan of 1st defendant which the family of these defendants (9th and 10th,) purchased in 998 (1822-3); that ultimately in 1005 (1829-30) their karnavan Komappa Nair purchased the jenm right also from plaintiff's karnavan Komappa Nair and Rama Nair, and these lands with other property were assigned to 9th and 10th defendants by their then karna-

vans in 1026 (1850-51,) and that neither plaintiff nor the 3rd defendant had therefore any right to the lands at present.

Eleventh defendant stated that the land III was his jenm property, and that the plaintiff's family held only an otti over it derived from his family by plaintiff's karnavan in 981 (1806-7).

1st, 2nd, 4th, and 8th defendants were *ex-parte*.

The issue was whether plaintiff's karnavan Komappan Nair sold the jenm of the plaint lands to defendant's karnavan in 1005 (1829-30.)

The following is taken from the Judgment of the Principal Sadr Amin:--

Upon whom does the burden of proof lie in this case is the first question to be determined. Is it for plaintiff to show that the karnavan of 1st and 2nd defendants originally obtained the lands on otti, and that the present possession of 9th and 10th defendants commenced under that otti demise, or is it for defendants to prove that lands amitted to have been once the jenm property of plaintiff's tarwad were in fact sold by them to the family of those defendants at a period subsequent to the date of the alleged otti mortgage? There are two conflicting presumptions here, one in favor of the right of a man to a thing found in his actual possession, and the other in favor of the continuance of a thing once admitted to exist. The defendants admitted that they originally derived possession from plaintiff's tarwad, and if nothing more happened afterwards to alter the nature of this possession it must be held to be still subordinate to that tarwad, and it was therefore for those who contended that this subordinate possession was at a later period matured into an independent one to establish it. The possession of a tenant in the eye of law being the possession of his landlord, a mere manual possession by one who acknowledges himself to be a tenant of another is wholly insufficient to throw the burden upon that other of establishing his title to recover.

1869. June 18. S. A. No. 113 of 1869.

The question has been moreover settled by former decisions. [The decrees of the late Sadr Court in Suit 142 of 1858 at page 22 of the Decree Book of 1859 and in Suit 84 of 1859 at page 99 of the same Book.] The first decision is a distinct authority upon this case. There the declaration sought to redeem a mortgage and the defence was " land not mortgaged but sold," and the Court held that the *onus* was on defendant, and on his failing to prove his purchase decree was given for plaintiff without requiring proof of the mortgage. The second decision also upheld the same principle. It being thus established by precedents that the *onus probandi* in a case of this kind rests with the alleged purchaser, I amended the original issue to allow the defendants an opportunity of establishing their purchase.

[He found that the deed of sale had not been established by the evidence.]

Plaintiff has consented to pay the amount entered in exhibit II, namely, 1,300 silver fanams.

For the above reasons I decree the return of the lands to plaintiff on his depositing in Court the otti amount of 1300 fanams and paying the value of improvements to 6th, 7th, and 8th defendants at the rate shown in the Amin's accounts, and order the 3rd, 9th, and 10th defendants to pay plaintiff's costs and saddle the defendants with their own costs.

The 9th and 10th defendants appealed to the Civil Court.

The Civil Judge dismissed the suit, stating his reasons as follows :—

The Principal Sadr Amin has in this case, I am of opinion, erred in throwing the *onus probandi* on the defendants. It is not as if they had fully admitted the plaint and had contented themselves with pleading the defence that their karnavan was the purchaser, but they have alleged in addition that the kanom on which the plaintiff has sued is not a correct one, but that he parted with his property in 971 (1785), and that therefore by Section 1, Clause

15 of Act XIV of 1859, he cannot bring the suit, the deceased karnavan having mortgaged it more than sixty years ago.

The Principal Sadr Amin has found that the alleged deed of sale is a forgery, and that being so, the defendants have the other ground, viz., that the suit is barred.

Now it seems to me that the plaintiff must first prove his case as alleged in the plaint, for the defendant is not bound to show anything till his title is disproved, he being the man in possession for a long series of years.

By none of his witnesses does he succeed in doing so—his own evidence that he has taken the jenmom share of the crop is very vague, and a mere assertion of the fact unsupported in any way.

I shall therefore reverse the decree of the Principal Sadr Amin, and direct that this suit be dismissed and that plaintiff pay all costs original and appeal.

The plaintiff appealed specially to the High Court.

Sloan, for the Special Appellant, plaintiff.

Mayne, for the Special Respondents, the 5th and 6th defendants.

The Court delivered the following

JUDGMENT:—This was a suit to redeem a mortgage alleged in the plaint to have been executed in 1816 and to be for 1,000 fanams.

The defendants 3, 9, and 10, members of the same tarwad, allege a sale of the jenm to their karnavan, but the 9th and 10th defendants in their statement admit a mortgage in 1796-7 for 1300 fanams by plaintiff's karnavan to the karnavan of 1st defendant, which mortgage was purchased by the family of the 3rd, 9th, and 10th defendants in 1822; and they produced amongst other documents the mortgage deed of 1796 for 1300 fanams. (No. 2,) and also a receipt (3) for the kanom amount of 1300 fanams in December 1822, and a Teer deed (4) given by 1st defendant's karnavan to the karnavan of defendants 3, 9, and 10, in 1814.

1869. June 18. S. A. No. 113 of 1869.

The 5th, 6th, and 7th defendants claimed under the 9th and 10th defendants, the 11th defendant stated that part of the property was his own jenm, and the other defendants did not appear.

The Principal Sadr Amin called upon the 3rd, 9th, and 10th defendants to establish the alleged sale of the jenm to their family, and disbelieved the evidence adduced by them on that point. Thereupon with the consent of the plaintiff he passed a decree for restoration of the lands in accordance with the terms of the mortgage of 1796, which the defendants had set up, but requiring the plaintiff to make compensation for improvements to 6th, 7th, and 8th defendants.

Against this decree only the 9th and 10th defendants appealed, and the Civil Judge thereupon dismissed the suit with costs. We understand the grounds of his decision to be that the plaintiff had not proved the mortgage alleged by him in his plaint, and that as to the mortgage admitted by the defendants 9 and 10, the plaintiff's suit was barred by the Law of Limitation.

On the hearing of the special appeal before us, it was argued by Mr. Sloan on behalf of the appellant that the case was taken out of the Law of Limitation by the written acknowledgment contained in the document No. 4. Now this document certainly does contain a distinct acknowledgment of the mortgage in 1796; and it is signed by the karnavan of the 1st defendant, who by this instrument transfers the said mortgage to the karnavan of 3rd, 9th, and 10th defendants. It was argued by Mr. Mayne on behalf of the defendants for whom he appeared that this was not a sufficient acknowledgment to take the case out of the law of limitation because it was given by the mortgagee to a third person, and not to the mortgagor or to any person claiming under the mortgagor. But the 15th clause of Section 1 of Act XIV of 1859 does not, in our opinion, require that the acknowledgment should be given to the mortgagor. The language of the Section is that " If in the meantime" (that is during the period of 60 years from the time of the mortgage) an acknowledgment of the " title of the mortgagor or of his right of redemption shall

"have been given in writing signed by the mortgagee or "some person claiming under him,"—the statutory period is to run "from the date of such acknowledgment in writing," and when this languge is compared with that of the English Statute on the same subject, *i. e.*, with Section 28 of 3 and 4 Will IV ch. 27, it is impossible to avoid the inference that the Indian Legislature intended that an acknowledgment of the title of the mortgagor should be sufficient whether made to the mortgagor or to a third person; for the above Section in the English Act contains the express provision that the acknowledgment must be given "to the mortgagor or to some person claiming his estate or to the agent of such mortgagor or person."

This inference is strengthened by the circumstance that prior to the enactment of 3 and 4 Will IV C. 27, the rule acted upon in the Court of Chancery regarding suits to redeem was the other way. This rule is stated by the Master of the Rolls in *Hansard* v. *Hardy*, 18 *Ves.* 459 in these words:—"It is however, said for the defendants "that these acknowledgments made in dealings with third "parties are totally foreign to the mortgagor; and that the "acknowledgment which is to operate so as to bar the "objection from length of time should be an acknowledg-"ment arising out of some transaction directly between "mortgagor and mortgagee. How far that would be the "more reasonable rule I shall not now examine, but "certainly it is not the established one. In the case of *Swart* "v. *Hunt* (4 *Ves* 478) it was in an assignment to a third "person that the mortgagor found the evidence of acknow-"ledgment upon which he was relieved." Other cases to the same effect are also cited by the Master of the Rolls; and having reference to this history of the decisions and legislation on the question we must assume that the Indian Legislature considered the old rule of the English Court of Chancery preferable to the statutory rule laid down in the 3rd and 4th W. IV. C. 27.

It is satisfactory to us to know that this conclusion is in accordance with a decision in the High Court of Calcutta quoted by Mr. Sloan from 3 *Weekly Reporter*, p. 3.

1869. June 18. S. A. No 113 of 1869.

The only question which remains is whether the Principal Sadr Amin was justified in passing a decree for the plaintiff in accordance with the terms of the mortgage (2) produced by the defendants, and we think that he was. The documents produced and relied upon by the defendants as genuine may be made the ground of a decree in the plaintiff's favor, if the relief granted be substantially such as was claimed in the plaint; and it is so in this case. The plaint was for restoration of the land on payment of 1,000 fanams, and the decree is for restoration of the lands on payment of 1,300 fanams, the plaintiff consenting thereto. We think therefore that the decree of the Civil Judge in this case must be reversed and the decree of the Principal Sadr Amin affirmed, and that the special respondents who appeared must pay costs of special appellant in this and Lower Appellate Court.

Original Jurisdiction (a)

Original Suit No. 221 *of* 1869.

KYLASANADA MOODELLY................*Plaintiff.*

ARMUGUM MOODELLY..................*Defendant.*

The defendant, the payee of a promissory note, endorsed it to the plaintiff. The endorsement was "Pay to K. M. (plaintiff) or his order." The promissory note had been registered previous to the endorsment to plaintiff. A suit was brought by the plaintiff three years after the date of the endorsement to recover the amount of the note from the defendant.

Held, that the suit was barred by the Law of Limitation.

O'Sullivan, for the plaintiff.

Mayne and *Miller*, for the defendant.

The facts are stated in the following judgment of

1869. June 22. C. S. No. 221 of 1869.

BITTLESTON J:—This is a suit by endorsee against endorser of a promissory note dated 23rd September 1865 and payable one month after date.

It was presented for registration by the maker on the 25th September and was then registered by the District Registrar of Madras, who at the same time recorded thereon

(a) Present: Bittleston, J.

the agreement of the maker and the payee that it might be enforced without suit under Sections 51 and 52 of Act XVI of 1864.

On the 12th March 1866, the payee, the defendant in this suit, endorsed the note in the usual form "pay to P. N. Kailasanada Moodelly or his order." This suit was commenced on the 24th April 1869, and the question is whether it is barred by the Law of Limitation. Now Act XIV of 1859, Sections 9 and 10, provides that three years shall be the period of limitation applicable to suits for breach of contract, when there is no written engagement or contract in writing, or when, there being such written engagement or contract capable of registration, it is not registered within six months from the date.

If therefore this were a suit by the payee against the maker of this promissory note, it is clear that neither of those clauses would apply, for the written engagement of the maker has been duly registered; and the period of limitation applicable to the case would be six years under Clause 16 of Section 1.

But this being a suit by the endorsee against the payee, who has endorsed to him, the questions arise whether this is a suit upon a new and different contract, whether if so the new contract is in writing and capable of registration, and whether it has been registered.

There cannot, I think, be any doubt that the contract of the endorser of a Bill of Exchange or Promissory Note is a perfectly distinct contract from that of the maker or acceptor, as was said by Montague Smith J. in the recent case of *Bradlaugh* v. *Derim* 37 L. J. C. P. 320 "The contract of the acceptor is made with the drawer to pay the bill at maturity to him or his payee or endorsee (as the case may be) or to the ultimate endorsee or holder. The original contract to pay no doubt passes by the law merchant by assignment. Superadded contracts may and do arise between the endorsers and those taking from them *inter se*; but the original contract remains against the acceptor." Now these superadded contracts are either written or unwritten; if unwritten, the limitation of three years must be held applicable; if written, can they be registered?

1869
June 22.
O. S. No. 221
of 1869

The liability of an endorser is in fact never expressed in words on the bill or note, and arises when he has merely signed his name on the instrument with the intention of transfering it and has delivered it to the transferee. The rights and liabilities of the respective parties consequent upon this act are settled by the law merchant, and even if, as in this case, the endorsement be special it cannot be said that the terms of such endorsement of themselves express the liability of the endorser to the endorsee.

In a recent case in this Court (Referred Case 39 of 1868 4 *Madras High Court Reports* 216), it was held that when the Limitation Act (XIV of 1859) refers to an engagement or contract in writing, it means a writing in which the undertaking of the party sought to be charged is expressed;—and it seems to me difficult to distinguish that case from the present on this point.

So under the English Stamp Acts it is held that the agreement or memorandum of agreement which is subject to Stamp duty must be a writing in which the parties have put down the terms by which they intend to be mutually bound; and on that ground an I. O. U. does not require an agreement stamp.

I am inclined to think therefore that the mere endorsement of a Promissory Note or Bill of Exchange is not such a written engagement by the endorser as falls within Clauses 9 and 10 of Section 1 of the Limitation Act.

The case of the maker of a promissory note or acceptor of a bill of exchange is essentially different, for in both cases the promise to pay is expressed, though the words used are different, the word "accepted" having a legal meaning precisely equivalent to a promise to pay.

If, however, the contrary view should be taken, and it should be considered that the endorsement of a bill of exchange or promissory note being construed according to merchantile law does contain an engagement in writing by the endorser to pay the endorsee in the event of a failure to pay by the acceptor or maker, then there seems no reason to doubt that that engagement may be registered. It may be suggested as a difficulty that there would be

nothing to register except a signature, and that Section 138 which requires a copy of the instrument to be made in a book could not be carried out, but if the signature at the back of the bill or note sufficiently expresses the legal engagement of the endorser, then the endorsement would be effectually registered by copying into the book the bill or note together with the endorsement. 1869. June 22. O. S. No 221 of 1869.

In the present case it is certain that no registration of the endoresement has taken place, and I do not see how the registration of the instrument prior to endorsement can affect the case.

I must conclude therefore that the period of limitatation is three years and the suit barred. The suit must be dismissed but I think without costs.

Appellate Jurisdiction (a)

Special Appeal No. 52 *of* 1869.

SOMASUNDARA TAMBIRAN.....*Special Appellant (Plaintiff)*

SAKKARAI PATTAN....*Special Respondent (2nd Defendant.)*

The mere possession of the title-deeds by a second mortgagee, though a purchaser for value without notice, will not give him priority. There must be some act or default of the first mortgagee to have this effect.

THIS was a Special Appeal against the decision of V. Sundra Naidu, the Principal Sadr Amin of Tranquebar, in Regular Appeal No. 215 of 1867, modifying the decree of the Court of the District Munsif of Sheally in Original Suit No. 98 of 1867. 1869. June 25. S. A. No. 52 of 1869.

The plaintiff, trustee of the Velur Covil, brought this suit to recover rupees 326, being the balance of principal and interest due on a mortgage bond executed to Arumuga Pandaram, the late trustee of the Covil, by the 1st defendant, on the 2nd December 1858.

(a) Present: Bittleston and Carmichael, J. J.

1869. June 25. S. A. No. 52 of 1869.

The second defendant was included as having caused the house mortgaged to plaintiff to be attached in execution of the decree alleged to have been fraudulently obtained by him in Original Suit No. 179 of 1866 on the file of the Court.

The first defendant admitted the plaintiff's claim.

The second defendant stated that the house referred to had been attached by order of the Court in execution of the decree passed in his favor in No. 179 which holds the house in question liable for its satisfaction.

The plaintiff filed the bond, but adduced no evidence to prove that the decree referred to was obtained by fraud.

The Acting District Munsif adjudged to plaintiff the amount sued for with costs the mortgaged house being liable for the satisfaction of the decree.

The second defendant appealed. The following was the Judgment of the Principal Sadr Amin:—

The plaint-bond has been admitted by the first defendant as having been executed by him, and it is clear from the second defendant's written statement that he did not impugn the genuineness of the same, but simply denied the knowledge of its execution. Therefore, the Appellate Court sees no reason to question the authenticity of the bond, though, in its opinion, the hypothecated property cannot legally be held responsible to the claim for the following reasons.

It appears that the decree obtained by the second defendant was passed on the 15th October 1866, and it was based upon a razinamah entered into between the first and second defendants in Suit No. 595 of 1863 on the file of the Tranquebar Munsif. In execution of that decree, the hypothecated house was attached, and, just at the time it was to be sold at auction, the plaintiff objected to it on the ground of his having a lien upon it, and requested that the sale should be suspended; but his prayer was not granted, and he therefore brought this suit.

It is clearly laid down in Section 270, Act VIII of 1859, that attaching creditors should be first paid out of proceeds of property sold. That the second defendant was

the attaching creditor is not disputed, and the property appears to have been since sold, and the proceeds of the sale are barely sufficient to cover the amount due to the second defendant.

Under these circumstances, the Appellate Court, in modification of the Lower Court's decree, exempts the hypothecated property as well as the second defendant from the claim, and adjudges that the plaintiff do recover the amount decreed to him, together with the appeal costs, from the first defendant, the costs incurred by the second defendant being borne by the first defendant.

The plaintiff presented a special appeal against the decree of the Principal Sadr Amin.

Savundaranayagam Pillai, for the special appellant, the plaintiff.

Sloan, for the special respondent, the second defendant.

The Court delivered the following

JUDGMENT:—This suit was brought to enforce a mortgage instrument executed by first defendant and bearing date 2nd December 1858. The second defendant had attached and sold the mortgaged property in execution of a decree obtained by him in a suit brought against the first defendant upon a mortgage of the same property executed in 1859.

The District Munsif decreed in favor of the plaintiff for payment of the amount sued for, and that the mortgaged property " do stand liable to the amount of the decree until satisfied."

The Principal Sadr Amin modified this decree by declaring the mortgaged property not liable for the debt, on the ground that by Section 270 of the Civil Procedure Code, it is provided that the attaching creditor should be first paid out of the sale proceeds of the property attached. But in the present suit there is no question how the sale proceeds of the property should be dealt with; that question can only arise in the suit in which the sale took place; and those sale proceeds represent only the value of the right, title, and interest of the defendant in that suit (the first defendant in this,) which interest was at most an equity of redemption only, if the mortgage now sued

1869. June 25. S. A. No. 52 of 1869.

upon by the plaintiff be valid. The attachment and sale of the property in that suit, to which plaintiff was no party, cannot affect the plaintiff's rights as a mortgagee under an instrument of mortgage of anterior date. The second defendant, however, has an interest in the mortgaged property which entitles him to require due proof of the plaintiff's mortgage. Both the Lower Courts appear to have erred in procedure in this respect. No evidence has been taken as to the genuineness of the plaintiff's mortgage, because it was admitted by the first defendant and because the second defendant simply denied knowledge of it. The second defendant could not be supposed to know anything about a mortgage transaction between the plaintiff and first defendant, and his denial of knowledge was sufficient to put the plaintiff on proof of it; but we do not find that any evidence was adduced by the plaintiff.

The case must therefore be sent back for the determination of the issue raised whether the plaintiff's alleged mortgage of 2nd December 1858 is genuine. In this issue is of course involved not only the question whether it was executed by the defendant but whether it was executed for a *bona fide* consideration and at the time when it purports to have been executed But assuming that the plaintiff's mortgage is found to be genuine, the second defendant claims priority for his mortgage dated in 1859, on the ground that with his mortgage he obtained possession of the title-deeds; and for this position he relies on decisions of the English Courts as well as of the late Sadr Court. An inaccurate reference is given in the fifth ground of appeal presented to the Lower Appellate Court, but we believe that the principal Sadr Court decisions on the subject are the following:—Special Appeal 2 of 1825 in the Volume of *Decisions of the Sudder Udawlut* 1805-47, p. 500, 508; Special Appeal 67 of 1858 at p. 123 of the decisions of that year, and Special Appeal 442 of 1861 at p. 97 of the decisions of 1862. The latest English cases are *Layard* v. *Mand*, 36 L. J. Ch: 669, and *Thorpe* v. *Holdsworth*, 38 L. J. Ch: 194, and from these, as from many other previous cases, we think it may safely be deduced that the true ground on which the possession of the title-deeds by a subsequent mortgagee can in any case

be held to give him precedence of one whose security is earlier in date is negligence on the part of the first mortgagee. In the latest case Gifford V. C. referring to *Layard v. Maud* says that "in that case there was conduct amounting to acquiescence in what was done on the part of the "first mortgagee, and the decision was founded on *Robert* "v. *Croft* (2 *De Gex and Jones* 1; 27 *L. J. Ch*: 220,) "which is one among the several authorities for the "proposition that the mere possession of the title-"deeds by a second mortgagee, though a purchaser for "value without notice, will not give him priority. There "must be some act or default on the part of the first mort-"gagee to have this effect." We consider this to be a just and reasonable rule to be applied in this country. The non-possession of the title-deeds by the first mortgagee is a circumstance which certainly calls for explanation on his part, but it may be explained; and if he can satisfy the Court that the absence of the title-deeds was reasonably accounted for to him at the time when he obtained his mortgage, or that he was subsequently induced to part with them upon such grounds and under such circumstances as to exonerate him from any serious imputation of negligence, he ought not to lose his priority because the mortgagor may afterwards have dishonestly handed over the title-deeds to a second mortgagee.

The genuineness of the plaintiff's mortgage is the first question to be considered in this case, but, if that be established, the Principal Sadr Amin must then decide whether the mortgage of the second defendant is genuine, and whether under the circumstances he is entitled to priority. The decree in Original Suit No. 179 of 1866 is not binding upon the plaintiff; and as against him the second defendant's title under the second mortgage must of course be established by independent evidence.

We reverse therefore the decree of the Principal Sadr Amin and remand the suit to be disposed of on the merits with reference to the above remarks.

The special appellant is entitled to his costs of this appeal from the special respondent; and all other costs will be disposed of by the Lower Appellate Court.

Appellate Jurisdiction (a)

Special Appeal No. 109 *of* 1869.

VELLAYEN CHETTY...*Special Appellant (1st Defendant.)*

AIYAN *alias* THANDAVAMURTY CHETTY.......................... } *Special Respondent. (2nd Plaintiff).*

The plaintiff sued for a quantity of land which was family property in the possession of his brother, the defendant. The defendant in a former suit declared that the land sued for was not family property but belonged to his sister, and in this suit he claimed the property under her will.

The Lower Courts found that the property was family property, but that the plaintiff was entitled to a decree for the whole property on the ground that the disclaimer of the defendant in the former suit amounted to an estoppel and forfeiture of his share.

Held, that the effect of the defendant's conduct did not operate either as an estoppel or a forfeiture, and that the plaintiff was only entitled to a decree for a moiety of the property.

1869. *June* 28. *S. A. No.* 109 *of* 1869.

THIS was a Special Appeal against the decision of V. Sundra Naidu, the Principal Sadr Amin of Tranquebar, in Regular appeal No. 81 of 1867, modifying the decree of the Court of the District Munsif of Mayaveram in Original Suit No. 4361 of 1861.

The plaintiffs sued to recover 1 veli 6 maws and $29\frac{5}{8}\frac{3}{4}$ gulies of land valued at rupees 1000, and also rupees 721-11-6, being the amount of produce for eight years from 1854.

The plaint stated that the first plaintiff and first defendant are brothers; that when they were undivided they acquired the land sued for in the name of the 1st defendant by means of the common fund and enjoyed it in common up to the year 1853; that subsequently the 1st defendant illegally took sole possession of the land and filed a suit (No. 9 of 1854) before the Sub-Court of Combaconum for division without including the land now sued for; that during the pendency of that suit, the present 1st plaintiff and 1st defendant appointed certain arbitrators and entered into an agreement before them on the 23rd December 1855 to the effect that the land sued for and other property should be equally divided between them; that the 1st

(a) Present: Scotland C. J. and Carmichael, J.

defendant having afterwards refused to allow the first plaintiff his share in the land under a false pretence that it did not form part of the family estate, he (1st plaintiff) was referred to a civil action. The first defendant having in his pleadings in Suit No. 9 of 1854 admitted that he had no title to a share of the land, the plaintiffs sued for the whole land and produce.

The first defendant, in his first written statement, stated that the land in question was purchased in his name by his sister Cauvery with her own money; that consequently neither he nor the plaintiffs had any title to that land; that the agreement referred to in the plaint was not genuine, and that the land in question did not yield profits to the extent mentioned in the plaint.

The first defendant put in another statement averring that, his sister Cauvery having died, he had succeeded to by her will all her property including the land in question.

The issues were, 1st, whether the land in issue forms part of the family estate of the parties as stated by the plaintiffs, or belongs to Cauvery as stated by the defendants—2nd, whether the agreement referred to in the plaint is genuine—3rd, whether the plaintiffs are entitled to the whole land and amount of produce as claimed by them.

The Munsif found that the land formed part of the family estate, having been acquired with the common fund of the family, and that it was enjoyed in common by the plaintiffs and defendants up to the year 1853.

The following is the Judgment of the Munsif upon the third issue—

It now remains to see whether the plaintiffs are right in claiming the whole land, and I am of opinion that they are. As the first defendant brought the Suit No. 9 of 1854 for division, he should have included therein his claim to a share of the land now in issue. But he omitted to do so. The present first plaintiff in his answer and rejoinder in that suit remonstrated against this omission, and the first defendant in his reply and depositions disclaimed all title to a share of the land in issue and stated that it belonged to

1869. June 28. S.A. No. 109 of 1869.

Cauvery. The defendants repeat the same disclaimer even in their present pleadings. This amounts to an absolute renunciation of their share in the land in issue. Besides, by accepting what was claimed by him as his full share and decreed to him by the Sub-Court of Combaconum, the first defendant has forfeited all title to a share in the land in question according to Hindu Law under which a co-sharer may waive his share by accepting a trifle, such acceptance operating as an estoppel against him and his heirs for ever (*Menu,* Chapter IX 207, *Mitakshara* Chapter I, Section II, sub-Sections 11, 12, Yainya Walcya 3 Digest 65, *Mayne's edition of Sir Thomas Strange's Hindu Law* 195 and 207.) The plaintiff cannot at all be compelled to do equity to the defendants who have committed iniquity to him. Under the rule " he that seeks equity must do equity"—a plaintiff is not compellable to give a defendant anything but what the defendant might as a plaintiff enforce. As the defendants in the present case are precluded from bringing a fresh suit for their share of the land in issue by reason of their having repeatedly disclaimed all title thereto and already obtained what they claimed as their whole share in the former Suit No. 9 of 1854, they are not at all entitled to the benefit of the above rule of equity in the character of defendants. Apart from all these considerations the conduct of the defendants, in attempting to defraud the plaintiff of his share by setting up a title in a third party and producing false evidence in support of it, entails on the defendants forfeiture of their share according to the text of *Menu,* Chapter IX, 213 and *Mitakshara* Chapter I, Section IX, sub-Sections 4, 5 and 12 (vide also *Manual of Hindu Law,* 2nd edition Section 273 and Judgment of Sudder Court in Special Appeal 40 of 1858.)

Upon appeal the Principal Sadr Amin confirmed the decision of the District Munsif.

The defendant presented a special appeal to the High Court

Johnstone, for the special appellant, the first defendant.

Savundranayagam Pillai, for the special respondent the second plaintiff.

The Court delivered the following 1869. *June* 28 *S. A. No.* 109 *of* 1869.

JUDGMENT:—The parties in this case are brothers, and the defendant formerly brought a suit against the plaintiff (No. 9 of 1854) for partition. In that suit the plaintiff, as defendant, set up that, besides the lands specified in the plaint, the property now in dispute was part of the family property. The defendant replied that it was the stridanum of their sister, but ultimately the suit was disposed of by a decree based on a razinamah dividing all the property specified in the plaint and leaving the defendant to recover his share in this disputed land by another suit if he chose, which he now brings.

The sister it appears is since dead, and the defendant (formerly plaintiff) still denying that it was family property claims to hold it under his sister's will. Both Courts have found that the land is family property, and have awarded, not a moiety, but the whole of the property to the plaintiff, on the ground that the defendant was estopped by his disclaimer in the former suit, and had, by the fraudulent title in his sister which he then set up, entailed on himself forfeiture of his right to share under the Hindu Law.

The question as to the land being family property is concluded by the finding of the Lower Appellate Court. With respect to the estoppel and forfeiture, we are of opinion that the decision of the Principal Sadr Amin is not maintainable. The whole effect of the defendant's conduct in the former suit amounts to resistance to a just claim, at most an unconscientious proceeding, but certainly not such as to operate either as an estoppel or forfeiture. Without saying how far the authorities quoted by the Munsif and referred to in argument can be considered as of force at the present day, it is sufficient to observe that they do not extend to this case. We are therefore of opinion that the plaintiff cannot recover more than a moiety of the property. Consequently, the decree of the Principal Sadr Amin must be modified to that extent. The parties must respectively bear their own costs throughout.

Appellate Jurisdiction (a.)

Referred Case No. 13 *of* 1869.

ACHOO BAYAMAH......................*Plaintiff.*

DHANY RAM and another... ....*Defendants.*

The plaintiff sued as the assignee of a mortgage of immoveable property to recover the amount of the debt from the mortgagor in pursuance of an express contract to pay the debt contained in the mortgage.

The mortgage was executed before the Registration Act (Act XVI of 1864,) came into operation. The assignment to the plaintiff was executed after the last Registration Act (XX of 1866) became law.

Held, per Bittleston, Innes and Collett, J. J. J., that the assignment, being an instrument operating to create an interest in immoveable property, and as such requiring to be registered under Section 17 of Act XX of 1866, was not admissible in evidence in a suit to enforce the personal obligation only. Small Cause Court Referred Case No. 36 of 1868 (*b*) dissented from.

Per Scotland, C. J.—That an instrument which has the two-fold operation of a simple contract or bond to pay a debt and a collateral mortgage security for the debt is admissible in evidence for the purpose of proving the simple contract debt.

1869. *June* 30. *R. C. No.* 13 *of* 1869.

THIS was a case stated under Section 22, Act XI of 1865, by H. W. Bird, the Acting Judge of the Cantonment Court of Small Causes at Cannanore, in Suit No. 181 of 1868.

The case stated was as follows :—

This is a suit brought by plaintiff, through her vakil, against the defendants for the recovery of rupees 103-8-0 on account of money due on a bond, with interest.

The case came on for hearing before me on the 26th day of February 1869, and was adjourned for further consideration, subject to the decision of the High Court upon the following case.

On the 3rd August 1864, the defendants executed a bond to one Jugganath Mudeliar for rupees 100 with interest on account of money lent mortgaging certain immoveable property, viz., a house and its compound, as security for the due payment of the debt.

(*a*) Present: Scotland, C. J. and Bittleston, Innes and Collett, JJ.

(*b*) IV. Madras High Court Reports, page 174.

It will be observed that when this bond was executed, Act XVI of 1864 had not come into operation.

1869.
June 30.
R. C. No. 13
of 1869.

On 1st July 1866 Jugganath Mudeliar executed a bond to the plaintiff in the present suit for payment of a debt due to her, selling and transferring to her all his right to the bond executed on 3rd August 1864 between the two defendants and himself and informed the defendants, and they allowed the same. This bond was not registered as directed in Section 17 of Act XX of 1866. Defendants' vakil admits the execution of the original bond between the defendants and Jugganath Mudeliar, but takes objection to being sued by plaintiff thereon, as the bond executed by Jugganath Mudeliar to plaintiff selling all his right on the bond is inadmissible, not having been registered.

Plaintiff brings forward her claim on the first bond executed in 1864, which she states does not require to be registered, and that she can bring evidence to prove the sale and transfer of the first bond mentioned in the second bond dated 1st July 1866.

Defendants object to this, on the ground that the plaintiff is not the proper party to claim the amount due on the said bond for the reason already stated.

Upon the foregoing facts, the Court is of opinion that the bond executed in 1866 is not admissible in evidence inasmuch as it was not registered, but that the bond of 1864 is admissible although not registered, as it was executed prior to Act XVI of 1864 having come into operation, and the present plaintiff can file a suit against defendants on the original bond supporting by evidence that the bond was sold and transferred to her by Jugganath Mudeliar.

Questions for the decision of the High Court are:—

1. Whether plaintiff, having failed to register the bond executed between her and Jugganath Mudeliar, and consequent thereon its being inadmissible, can sue the defendants on the *original* bond and bring forward evidence to prove the transfer?

1869. June 30. R. C. No. 13 of 1869.

2. Must an instrument executed before the operation of Act XVI of 1864 be registered before any action can be taken on it, or it can be admitted in evidence ?

No Counsel were instructed.

The Court delivered the following judgments :—

COLLETT, J.—The answer to the first question as it is stated by the Court of Small Causes is clearly no. The assignment is by an instrument in writing and if that is not admissible in evidence, because not registered, it is not allowable to give other evidence of the assignment. The answer to the second question is also no. It would be sufficient for the disposal of the reference if we simply answered the questions as they have been stated to us, but I am afraid that if we did so, we should be leaving the Court below to take an erroneous view of the case, as from the facts stated it is apparent that the question requisite to the right disposal of the case has not been raised and stated. The document of the 3rd August 1864 created an interest in immoveable property, and the document of the 1st July 1866 operated as an assignment of that interest and the value was rupees 100, and this latter document was therefore within Section 17, Act XX of 1866, and ought to have been registered. But this is a Small Cause suit, and the object of the suit is necessarily limited to enforcing the personal obligation, and the question in the case that really arises to be considered is, whether the document of the 1st July 1866 can be given in evidence in a suit to enforce the personal liability for the debt, though by Section 49 of the Registration Act it would be inadmissible in evidence in a suit to enforce the interest in the land ? In Referred Small Cause Case 36 of 1868 (a) this question was decided by this Court in the affirmative. There are two Bengal cases on the point which are to the same effect. One is reported in 9 *Calcutta W. R.* 3, (*Civil Rulings*) in which *Peacock, Chief Justice,* took part but gave no reasons for his judgment ; and the other is in 10 *Calcutta W. R.* 252 ; (*Civil Rulings.*) in which the reasons given are such, as, according to the decisions of the

(a) Ante page 174.

Madras High Court would in this Court be regarded as erroneous. The terms of Section 49 are that "No instrument required by Section 17 to be registered shall be received in evidence in any Civil proceeding in any Court unless it be registered." These are the words of the Section which raise doubts in my mind. In the Bengal cases reliance seems to have been placed on the fact that it was not sought by the suit to "affect any immoveable property," referring to the words of the latter part of the Section. But it is not, as it seems to me, in these words that the difficulty lies. The difficulty to my mind is how the words in the first part of the Section quoted above are to be got over. This document of 1866 is undoubtedly an instrument which, as an entirety, is required by Section 17 to be registered, and the prohibitive words of Section 49 are very wide and general, "in any Civil proceeding in any Court," that is, as it seems to me, for any purpose whatever as evidence, whether to affect the property or not. I should be glad to be able to take the view adopted in Small Cause Referred Case 36 of 1868 (*a*), for no doubt prohibitions of this nature occasionally work great injustice, but it seems to me that the above cited words are so wide that I cannot rightly concur in following that judgment. I observe that though the registration of the document of 1864 was not compulsory, yet it was an instrument which from its nature might have been registered under the old Regulation. No question as a consequence of this has been raised between the parties, and I do not wish to suggest any, but I only notice this feature in the case that it may not be supposed to have escaped observation.

Bittleston, J.—If this case is to be decided independently of authority, I must express my concurrence in the opinion of Mr. Justice Collett.

Act XX of 1866, Section 17, expressly requires that certain instruments SHALL *be registered*, and the instrument in question is one of the kind there referred to. By Section 22, the time within which registration is to take place is fixed at four months from the date of execution except under special circumstances and it appears to me that, quite

(*a*) Ante page 174.

1869. June 30. R. C. No 13 of 1869.

independently of the purpose of furnishing satisfactory proof of the transaction in case of dispute, the Legislature intended to *insist* upon compliance with the above requirements in order that a complete registry of the titles to land throughout the country might by degrees be obtained. In furtherance of this object, the decrees of Courts affecting land are required to be registered, though practically no additional security as respects proof is thereby afforded. Then Section 49 in distinct terms provides that no instrument required to be registered shall be received in evidence in any Civil proceeding in any Court, unless it shall have been registered in accordance with the Act. The only question which (as it seems to me) the Court can consider under this Section is, whether the unregistered instrument was one which by the Act is required to be registered within four months of the execution. This question is to be determined by the nature of the instrument at the time of its execution, and not by the purpose of the suit in which it may be afterwards tendered in evidence ; and if that question must be answered in the affirmative, it seems to me that the Legislature has prohibited every Court from receiving the instrument in evidence in any suit. The English decisions as to the admissibility of unstamped documents for a collateral purpose, do not, I think, afford a safe guide to the construction of the Indian Registration Act.

I have given my opinion in this case independently of the authorities which have been referred to, because the Chief Justice and Mr. Justice Collett, before whom it came in the first instance, have desired that it should be submitted to the judgment of the whole Court; and because it appears that two other Judges as well as myself dissent from the ruling in Referred Case No. 36 of 1868. (*a*)

INNES, J.—It seems to me that the question of the admissibility in evidence of the document of 1866 has neither arisen in this case nor been referred by the Judge, and that therefore it does not call for any opinion.

Plaintiff offered the document of 1866 in evidence, but upon the objection being taken to its admissibility, he

(*a*) Ante page 174.

seems to have acquiesced in the objection and determined to prove the assignment *aliunde*, which of course he could not do, and this is the answer to the first question referred by the Judge. To the second question the answer should be also in the negative. Although I do not consider that the question of the admissibility in evidence of the document of 1866 arises in this case, I will give my opinion upon the question, as the Chief Justice, Sir Adam Bittleston, and Mr. Justice Collett think that it does arise. The decision in Referred Case No. 36 of 1868 (*a*) decided the point now raised, but I cannot bring my mind to agree in that decision.

The question, as applicable to the facts of the present case, seems to me to depend upon whether the document is one which by Section 17 of Act XX of 1866 is required to be registered. If it is, I do not see how the prohibition of Section 49 can be got over. Undoubtedly it is an instrument which operates to create an interest in immoveable property, and as such it appears to me that the provisions of Section 17 require that it shall be registered, and the circumstance that it is offered in evidence to prove a further interest created by the instrument, which, if it stood alone, would not render registration obligatory under Section 17, does not seem to me to except the instrument from the operation of Section 49. It is not on that account the less an instrument which required registration.

It seems to me impossible to say that in certain respects it is an instrument which required registration and in certain other respects is not so. Such provisions of the instrument as, if they stood by themselves, would not render registration obligatory cannot be separated from the other portions in respect of which it is obligatory. And though it is possible that the Legislature may not have intended to shut out such instruments from being given in evidence of interests other than those in respect of which registration was obligatory, the language of the Section appears to me so clear as to leave no room for a resort to other means than the plain meaning of the language itself for ascertaining the intention of the Legislature. I am therefore of opinion that the instrument was not admissible in evidence.

(*a*) Ante

1869. June 30. R. C. No. 13 of 1869.

SCOTLAND, C. J.—The plaintiff in this case sues as assignee to recover on the instrument dated the 3rd August 1864 as a simple contract to pay a debt, and I understand from the case that the assignment by Juggnath Mudeliar to the plaintiff was made by the instrument dated the 1st July 1866, and transferred all Jugganath's rights under the former instrument. That being so, proof of the instrument of assignment was essential to entitle the plaintiff to recover, and other evidence of it is not admissible. This is an answer to the first question submitted for decision. But the question affirms the inadmissibility of the assignment and makes it necessary to consider whether, as it purports to transfer Jugganath's right as mortgagee in certain immoveable property under the instrument sued upon and has not been registered under Act XX of 1866, it is rendered by Section 49 of that Act unavailable as an assignment of the debt simply, and in my opinion it is not. I have not been able, after the further consideration which the opinions of my learned colleagues have led me to give to the provisions of the Act, to alter the opinion that the construction which is expressed in the Judgment in Small Cause Referred Case No. 36 of 1868 (a) is the one that best gives effect to the intention of the Act. The object of Section 49 was solely, I think, to prevent instruments from being of legal force for any of the purposes which make registration compulsory under Section 17. This is especially made evident by the words in Section 49 " or shall affect any property comprised therein." To give due effect to the intention of the Legislature as well in regard to optional registration under Section 18 as to compulsory registration under Section 17, it appears to me that Section 49 should be read as if it had expressly said that no instrument should be received in evidence, &c., for any of the purposes specified in Section 17 unless registered. Upon this construction it is that I consider it in accordance with the intention of the Legislature to hold that an instrument which has the two-fold operation of a simple contract or bond to pay a debt and a collateral mortgage security for the debt, as well as an instrument which purports to be an assignment of such contract and security is

(a) Ante

admissible in evidence for the purpose of proving the separate liability under the simple contract in respect of which registration was not required by Section 17.

1869. *June* 30. *R. C. No.* 13 *of* 1869.

The second question submitted in the case admits of no doubt. Registration of the bond executed by the defendant before the passing of Act XVI of 1864 was not necessary to render it a valid instrument.

Appellate Jurisdiction (a)

Special Appeal No. 411 *of* 1868.

NIJAMUDIN..........................*Special Appellant.*

MAHAMMADALI and another......*Special Respondents.*

An admission or acknowledgment in writing under Section 4 of the Limitation Act (Act XIV of 1859), is sufficient to give a new period of limitation although a promise to pay on request is not inferrible from it. The word due in the Section means no more than that the debt is owing and that there is an existing obligation to pay it.

An acknowledgment made in writing to a third party and not to the creditor is sufficient under the Section.

Quære.—Whether an acknowledgment to satisfy the Section must be made before suit.

The English and Indian Law of Limitation considered and contrasted.

THIS was a Special Appeal against the decree of Srinivassa Row, the Principal Sadr Amin of Mangalore, in Regular Appeal No. 398 of 1866, reversing the decree of the Court of the District Munsif of Mangalore in Original Suit No. 193 of 1864.

1869. *July* 1. *S. A. No.* 411 *of* 1868.

The plaintiffs brought this suit in order to recover from the defendants the sum of rupees 784-5-4, being the balance of interest and principal due under the document executed by the defendants' deceased father Siyabuddin to Saiyad Abdulrahiman, the deceased maternal uncle of the 1st plaintiff's daughter, the 2nd plaintiff.

(a) Present: Scotland, C. J. and Collett, J.

1869. July 1. S. A. No. 411 of 1868.

The 1st defendant stated that according to the karar executed by the plaintiff's ancestor Abdulrahiman to the defendants' grandfather Mahommad Aminuddin Saheb, the interest due under the disputed document was paid by means of the produce of the land sold conditionally by the 1st defendant's father to the said Abdulrahiman ; that consequently there was no reason for the interest being paid separately ; that in case of the plaintiff's giving up the said land which was claimed in Suit No. 79 of 1865 brought by the 1st defendant under the karar, the principal amount would be paid.

The Munsif gave the following judgment dismissing the suit :—As it appears from the plaint itself that the term fixed for the payment of disputed money had expired on the 6th April 1845, the plaintiff's claim is barred by the Limitation Rules. The circumstance of the defendants having, after the expiration of the term, paid interest does not remove the bar. Though the 1st defendant maintained that Abdulrahiman executed a karar to the grandfather of the former with a stipulation of relinquishing the land sold by the 1st defendant's father to the said Abdulrahiman in the event of the sale amount thereof as well as the amount of the disputed document being paid within the 21st July 1865, yet the said karar was pleaded by the plaintiffs to be a forgery, and was cancelled in Suit No. 79. The 1st defendant consented to give the disputed debt on the condition that the land sold conditionally by his father to Abdulrahiman should be returned to him (1st defendant), and the Court, having considered the same independently of such condition, comes to the conclusion that the said consent is not to be considered to be of such kind as is necessary under Section 4 of Act XIV of 1859, for the prolongation of the period limited for the demand of debts. Consequently, the plaintiffs' claim has been dismissed with costs.

The plaintiffs appealed, and the Principal Sadr Amin came to the conclusion that the decision of the Lower Court was erroneous for the following reasons :—

Even though the term fixed for the payment of the amount of the document A, for the recovery of which the present suit has been brought, had expired, and the plea raised by the 1st defendant under the karar No. I was set aside as being false and unfair, still, the Principal Sadr Amin does not accept the conclusion arrived at by the Munsif to the effect that the plaintiff's claim was barred by the Limitation Rules.

The 1st defendant, who is the yajaman of the other defendants, and who opposes the plaintiffs' claim, admits even now that his father had *bonâ fide* executed the document A to the plaintiff's ancestor Saiyad Abdulrahiman, and that the amount thereof is payable. Besides this, the 1st defendant having, prior to the institution of the present suit by the plaintiff's, produced before the Court on the 20th July 1864 the amount of the said document, requesting the same to be caused to be paid to the present plaintiffs and others who are the heirs of the said Abdulrahiman, presented the petition, exhibit XIX of the Appeal Suit No. 312. Moreover, he (the 1st defendant) preferred the suit which gave rise to the Appeal Suit No. 312 setting forth that the amount of this disputed document also should be caused to be paid by him, and the land, &c., for which a deed of sale was passed by his (1st defendant's) father to the said Abdulrahiman, should be directed to be given over to him. Though the 1st defendant got up the karar exhibit No. I of the present suit, and carried on proceedings in support of the same, yet the admission made by him to the effect that the amount of the document A is payable, cannot be set aside, inasmuch as the document A as well as the circumstance of the amount thereof having been payable by the 1st defendant's father to the plaintiff's ancestor Abdulrahiman is true. Though the term of the said document had expired, and the claim may be barred by the Limitation Rules, yet, as the 1st defendant admitted the fact of the money being payable and produced the same before the Court together with a written consent, the period of limitation will run newly from that date under Section 4 of Act XIV of 1859. Consequently, the fact of

1869.
July 1.
S. A. No. 411
of 1868.

the limitation period having expired already cannot affect the plaintiff's claim.

The defendant appealed specially to the High Court.

Srinivasa Chariyar, for the special appellant, (1st defendant.)

Parthasarathy Aiyangar, for the special respondents, (plaintiffs).

The Court delivered the following

JUDGMENT :—This is an appeal from a decree for the payment by the defendants to the plaintiffs of the principal sum which became payable on the 6th April 1845 under an agreement executed by the defendant's father in favor of the maternal uncle of the 2nd plaintiff together with interest; and the question to be determined is whether there has been a sufficient acknowledgment in writing by the defendants to give a new period of limitation under Section 4 of Act XIV of 1859.

The Lower Appellate Court appears to have decided the case upon the joint effect of the 1st defendant's statements in the Miscellaneous Petition signed by him, and dated the 20th July 1864, and in the written statement put in by him as the yejaman of the other defendants in answer to the plaint. But the documents have been very properly dealt with separately in argument. The petition appears to have been presented to the Court of First Instance a short time prior to the institution of this suit, but not in any pending suit or proceeding, and probably with a view to induce the plaintiffs through the interference of the Court to accept its terms rather than sue on their claims. Nothing, however, appears to have been done upon it.

It sets forth that before the execution of the agreement upon which this suit is brought, certain property had been sold by the defendant's father to the 2nd plaintiff's maternal uncle, Abdulrahiman, for rupees 600, subject to a

condition of re-sale limited to the 6th April 1845. That the principal sum rupees 500, for which the said agreement was executed, was due to Abdulrahiman independently of the amount of the consideration mentioned in the sale-deed and payable on the same day. That on the death of the defendants' father their grandfather entered into an agreement with Abdulrahiman for the application of the produce of the land sold to the payment of the interest on the said sum, and thereupon Abdulrahiman executed a karar stipulating to return the land with the documents if the purchase money and the rupees 500 were paid by the 21st July 1865. Then after referring to the death of the defendant's grandfather and Abdulrahiman, it further states that as the time for the payment of the fourth instalment was to expire on the next day, the petitioner had produced therewith rupees 1100 " which is the sum due on the whole according to the said karar, and also under the said deed of sale," and concludes with a request that the money might be received and caused to be paid to the true heir of Abdulrahiman, and the land directed to be given up with the documents relating thereto.

The karar stated to have been entered into by the defendant's grandfather has, it appears, been found in another suit, decided since the institution of this suit, to be a forgery, but that can make no difference in the consideration of the point now raised, which is simply one of construction,—does the petition contain such an acknowledgment and admission as Section 4 of the Act of Limitations requires ? It acknowledges in the most distinct terms that the principal sum sued for was an existing debt which the defendant was liable to pay, but not an immediate liability to pay such debt., for the acknowledgment is coupled with the statement that the whole amount would not be payable until the 21st of July in the next year, and the proffer of payment is subject to a condition which the plaintiffs repudiate. It is not therefore such an acknowledgment as would take a case out of the operation of the English Statute of Limitations for the reason that it would not support a promise to pay on request.

1869. July 1. S. A. No. 411 of 1868.

But that is not an objection under the 4th Section of the Indian Act, as it does not in our opinion require an admission evidencing a promise to pay. This point was observed upon in the case of *Kistna Row* v. *Hachapa Sugapa*, 2 *Madras H. C. Reports*, 310, and the Judges who decided the case intimated the opinion that an acknowledgment which contained a distinct admission of a debt due and owing to the creditor would suffice to satisfy the Section, although accompanied with expressions which precluded the inference of a promise to pay on request. That opinion was concurred in and made a ground of decision in the case of *John Young* v. *Mangala Pilly Ramaya*, 3 *Madras H. C. Reports*, 309, and we are satisfied that the Section has in this respect been rightly interpreted. The English rule rests on the grounds that at the time of passing of Lord Tenterden's Act, 9 Geo. 4, Cap. 14, an acknowledgment was sufficient to defeat the Statute of Limitations (21 Jac. 1) only when it expressed or evidenced by implication a promise to pay so as to give a new cause of action, and that 9 Geo 4, Cap. 14 merely substituted proof by writing for verbal testimony. In both these respects there is the wide difference between the 1st Section of 9 Geo. 4, Cap. 14, and the 4th Section of the Indian Act, that the latter was not passed with reference to a state of law at all similar anywhere in India, we believe, and it does not provide for a written acknowledgment as evidence of a new contract, but that a written admission of a debt shall give a fresh period of limitation for a suit to enforce the original liability. The whole language of the Section shows clearly, we think, that the purpose of the Legislature was simply to provide for the renewal of the right to bring the suit which might have been brought but for the bar under one of the other Sections of the Act.

But although the acknowledgment is not objectionable because a promise to pay on request is not inferrible from it, we must consider whether the Section requires an admission that the debt is *payable*, for if so the plaintiff's right to sue was renewed only as to a part of the debt. The words of the Section are—" If the person who but for the

1869. *July* 1. *S. A. No.* 411 *of* 1868.

law of limitation would be liable to pay the same shall have admitted that such a debt or legacy or any part thereof is due by an acknowledgment in writing signed by him." In speaking of a debt, the word "due" is not unfrequently used in the sense of "payable," but its proper signification does not require that it should be understood to mean more than that the debt is owing—that there is an existing obligation to pay it, and we think that this is the sense in which it is used in the Section. It requires in general language that there should be an admission of a liability to pay on the part of the person making the acknowledgment, and there is nothing to show that an admission of liability to an existing ascertained debt payable at a future day was intended to be excluded; and the word "due" is applicable to such a debt. We think therefore that the statement in the petition as to the date of payment does not affect the admission.

The further point arises in the case whether the admission is inoperative because it was made to the Court of First Instance and not to the plaintiff. We can see nothing in the Section to warrant its being construed to apply only to admissions made to the creditor himself, and if it cannot be so restricted it must have a perfectly general operation. The absence of any express mention of the person to whom the acknowledgment should be made, such as is to be found in the English Limitation Act relating to real property, (3 and 4 William 4, Cap. 27, Section 14,) is of itself strong to show that such a construction was not intended. Again the whole object of the provision being obviously to give the benefit of a fresh period of limitation when the liability to a debt had been admitted in writing, there seems to us to be no good reason why the Legislature should have required the writing to be addressed to the creditor alone, and the language used appears to us to be general in its import.

We have met with a case (*Persaud Doss* v. *Deurnautt Dey* reported in *Hyde's Rep. for* 1862-63, *page* 15), in which it was decided by a late learned Judge of the High Court

1869. July 1. S. A. No. 411 of 1868.

of Bengal that an admission stating that a debt was still due did not amount to an acknowledgment of a liability to the person to whom the debt was due, and was therefore an insufficient admission. But there, according to our understanding of the case, the writing did not state that the admitted debt was due to the creditor, and we infer from the reasons in the judgment that probably the decision would have been different, had the writing contained such a statement. In this view, the case is distinguishable, for here there is a distinct admission of liability to pay the debt to the plaintiff, and we agree that such an admission is necessary.

The English cases in which it has been held that acknowledgments to third persons were not sufficient under Lord Tenterden's Act, and which will be found referred to in *Howcutt* v. *Bonser*, 3. *Exch. Reports*, 491, have, we think, no useful bearing on this question. They rest entirely upon the principle that an acknowledgment to be sufficient under the Act must amount to a promise to pay on request so as to create a fresh cause of action, and necessarily therefore must be made to the creditor suing to recover the debt, but by the construction of the 4th Section of the Indian Act, which we have just laid down, that principle is rendered altogether inapplicable.

For these reasons we decide that the admission contained in the petition addressed to the Court of First Instance was sufficient to give a fresh period of limitation, and this decision makes it unnecessary to consider with reference to the admission in the defendant's written statement whether an acknowledgment to satisfy the 4th Section must be before suit. The decree of the Lower Appellate Court will be affirmed with costs.

Appellate Jurisdiction (a)

Referred Case No. 5 of 1869.

KUMARA VENKATACHALA REDDIAR, ZEMINDAR.......................... *Plaintiff.*

NARAYANA REDDY........................ *Defendant.*

A suit was brought in the Small Cause Court by a Zemindar against a ryot for arrears of rent. The plaintiff alleged that he had tendered puttahs which the defendant was bound to accept, and the defendant alleged that the rent specified was such that he was not bound to accept the puttahs.

Held, that the suit was not cognizable by a Court of Small Causes, there being no contract between the parties for the payment of rent.

THE following case was stated under Section 22, Act XI of 1865, by Appaviyah, the District Munsif of Perambalore, in Small Cause Suit No. 559 of 1868 :— 1869. *July 6.* *R. C. No. 5 of* 1869.

This is an action brought by the Zemindar to recover rupees 47-9-6, arrears of rent due by his tenant the defendant for Fuslies 1275 and 1276.

The case was heard before me a second time on the 25th instant, and was adjourned for further hearing subject to the decision of the High Court upon the following case :—

The plaintiff states that he tendered a puttah on the 20th April 1866 for Fusli 1275, and one on the 5th February 1867 for Fusli 1276; but that the defendant refused to accept either of them or to give in muchilka; that he then caused notices to be served upon the defendant that the latter did not attend to the requisition therein contained, and that hence this suit.

The defendant denies that any puttah was tendered by the plaintiff or notice served upon him, and asserts that the land in his (defendant's) possession is not liable to such a rate of rent as that claimed by the plaintiff.

(a) Present: Scotland, C. J. and Collett, J.

1869
July 6.
R. C. No. 5
of 1869.

I am of opinion that this suit is not maintainable, for it involves an enquiry and decision of several of the points mentioned in Sections 10 and 11 of (Madras) Act VIII of 1865, forming the subject, I think, of a separate suit before the arrears of rent claimed can be determined; and the plaintiff should have either applied to the Collector as laid down in Section 9 or brought a suit in the Court to settle the rate of rent agreeably to the latter part of Section 87 of the said Act before he can claim arrears of rent, but he has not done one or the other. If it shall perhaps be thought that such a suit as this involving dispute regarding the rate of rent can lie, and that the Court trying the suit should incidentally determine the rate of rent before it can pronounce a decision on the arrears claimed, even then it occurs to me that such a suit should be excluded from the cognizance of a Small Cause Court, for no appeal lies from the decision of such Court, and the decision regarding the rate of rent is a very important point, and is in a separate suit appealable by the party dissatisfied with such decision.

The question on which the decision of the High Court is solicited is, whether this suit is maintainable ?

No Counsel were instructed.

The Court delivered the following

JUDGMENT.—This is a suit by a Zemindar against a ryot for two years' rent in arrears, the Zemindar alleging that he duly tendered puttahs which the ryot refused to accept, and the ryot alleging that the rent specified was such that he was not bound to accept the puttahs. Assuming that the puttah tendered was such as the defendant was bound to accept, it has been decided by this Court (See 4, *Madras High Court Reports*, 149), that a suit will lie in a Court of Small Causes to recover arrears of ascertained rent on proof of a due tender of such puttah, and that it is not an essential preliminary to such a suit that the landholder should have availed himself of the summary remedy provided by Madras Act VIII of 1865 to enforce the exchange of puttahs and muchilkas. The

question in the present case is whether a landholder within Section 3 of Madras Act VIII of 1865 can, in the guise of a suit for arrears of rent, require a Court of Small Causes to decide between him and the occupying ryot upon his claim to compel the latter to occupy upon the terms of his paying rent at particular rates when no contract in respect of rent has been made between them. Section 7 of the Act clearly contemplates the existence of a contract as to the terms of a tenancy, and then enacts that there may be a suit "*to enforce the contract,*" though there has been no exchange of agreements in the form of puttah and muchilka, provided that there has been a tender of such a puttah or muchilka as the other party was bound to accept, that is to say, one in accordance with the contract sought to be enforced. Where there has been no contract as to rent and the terms of the tenancy are unascertained and in dispute between the parties, Sections 8, 9, and 10 provide a summary remedy by a suit before a Collector; and looking to the general terms of Section 87 of the Act, it is apparently contemplated that the rights of the parties might be also enforced by regular suit in the ordinary Courts. But the jurisdiction of a Court of Small Causes is limited to the kinds of suits specified in Section 6, Act XI of 1865. One of those kinds is a suit for rent, and the word "rent" in that Section must be taken in its ordinary sense, and so taken, a suit for rent assumes the existence of a contract between the parties regarding rent. Now, in the present case, the defendant, the occupant of the land, has not entered into any contract with the plaintiff for the payment of rent at the rate which the plaintiff seeks to charge him with. The Zemindar has a right (by means at least of the summary suit provided by Madras Act VIII of 1865) to compel the occupying ryot to enter into a contract in writing, fixing the rent to be paid by him, but the right is subject to the peculiarity that, if the parties cannot agree upon the terms of the contract, the Court will, acting upon certain definite rules, settle the terms of the contract, and compel its execution and acceptance by the parties. As soon as such a contract has been entered into, there is an agreement regarding rent between the parties, and the arrears

1869
July 6.
R. C. No. 5
of 1869.

1869. July 6. R. C. No. 5 of 1869.

of the rent subsequently accruing due may be sued for in a Court of Small Cause. In the present case, the suit is for rent, and it is admitted by the plaintiff that there never has been any contract by the defendant to pay the rent sued for. Our answer therefore to the question submitted is that the suit is not maintainable, and that the Zemindar should be left to pursue his remedy to enforce the peculiar right which he has of compelling the ryot to enter into a contract in writing for the payment of rent.

Appellate Jurisdiction (a.)

Special Appeal No. 129 *of* 1869.

KONDAPPA NAIK..........................*Special Appellant.*

ANNAMALAY CHETTY and another...*Special Respondents.*

A permanent lease of a village in a muttah by the Muttahdar (plaintiff's father) is not invalidated by Section 8 of Regulation XXV of 1802, although the lease has not been registered as required by that Section.

Subrayalu Naick v. *Rama Reddy*, 1 Madras High Court Reports, 143 overruled.

1869. July 13. S.A. No. 129 of 1869.

THIS was a Special Appeal against the decision of C. F. Chamier, the Civil Judge of Salem, in Regular Appeal No. 296 of 1868, confirming the decree of the Court of the Principal Sadr Amin of Salem in Original Suit No. 141 of 1867.

This suit was brought to cancel the lease of the village of Garegapully, attached to Luckanaickenputty muttah, and also to recover the arrears of rent rupees 400-9-0 due for Fuslies 1274 and 1275.

The plaint alleged that, on the 28th March 1843, the village was obtained on lease by defendant from the late Muttahdar, Chinna Chetty, father of 1st plaintiff, and grandfather of 2nd plaintiff, at an annual rent of rupees 161; that on the death of Chinna Chetty, the muttah was registered in the names of plaintiffs in 1863; that the

(a) Present:—Scotland, C. J. and Collett, J.

lease is prejudicial to the plaintiff's interest; that the lessor is dead, and his successors the plaintiffs are unwilling to continue the lease; that as the lease is invalid and ineffectual under the rulings of the High Court in Special Appeal No. 15 of 1862, the plaintiffs asked defendant to give up the leased village, but to no effect.

The Principal Sadr Amin gave judgment for the plaintiffs.

Upon appeal, the Civil Judge confirmed the judgment of the Lower Court. A Special Appeal to the High Court was thereupon preferred by the defendant.

Scharlieb, for the special appellant, the defendant.

Miller, for the 2nd special respondent, the 2nd plaintiff.

The Court delivered the following

JUDGMENT:—This is a suit brought to recover possession of a village in the plaintiff's muttah which had been leased permanently to the defendant by the late Muttahdar, the father of the 1st plaintiff, on the ground that the lease, not having been registered as required by Section 8, Regulation XXV of 1802, was not binding on the plaintiff. The Civil Court, affirming the decree of the Court of First Instance, held on the authority of the decision of this Court in *Subbarayulu Naik* v. *Rama Reddy* 1, *Madras High Court Reports*, 143, that the lease was invalid and decreed possession to the plaintiffs. From the decree of the Civil Court the defendant has appealed, and the ground urged on his behalf is that the decision of the Privy Council in the case of *Venkateswara Yettiappa Naiker* v. *Allagoo Moottoo Servaguren* 8, *Moore I. A. C.* 327, has established that a permanent lease is not a disposition within the provisions of Section 8, Regulation XXV of 1802, and should govern this case.

It is certainly a distinct decision upon the point adverse to the decision of this Court and directly supports the validity of the defendant's lease, and this Court is

1869. July 13. S. A. No. 129 of 1869.

bound to accept and apply the construction of the law as therein laid down. There were no doubt special circumstances in that case which do not exist here; but the decision as to the construction of the Regulation was distinct that a permanent lease of a portion of a zemindary is not within the terms of the Section. The Court was not aware of the decision when judgment was given in the case of *Subbarayalu Naik* v. *Rama Reddy*, nor until the general question as to the construction of the same Section arose, which was ultimately decided in the case reported in 3, *Madras High Court Reports*, 5. We must now consider the decision of this Court as overruled and hold on the authority of the decision of the highest Court of appeal that the permanent lease made to the defendant is not invalidated by Section 8 of Regulation XXV of 1802.

There will be a decree reversing the decrees of both the Lower Courts and dismissing the suit, and ordering restoration of the village to the defendant.

The parties should, we think, bear their own costs throughout.

Appellate Jurisdiction (a.)

Special Appeal No. 512 *of* 1868.

MUTTUSAMY MUDALY.............. *Special Appellant.*
SADAGOPA GRAMANY................*Special Respondent.*

Under Madras Act VIII of 1865 a landlord may compel a tenant to accept a puttah for palmyra trees.

1869. July 19. S. A. No. 512 of 1868.

THIS was a Special Appeal against the decision of W. S. Whiteside, the Acting Civil Judge of Chingleput, in Regular Appeal No. 120 of 1867, confirming the decision of the Acting Sub-Collector of the Madras District in Original Suit No. 70 of 1867.

It was stated in the plaint that the defendant refused to execute a muchilka and receive either a tirva or a vara puttah for Fusly 1276 for 52 palmyra trees which are in the defendant's possession, and chargeable with an annual rent of rupees 3-4-0.

(a) Present: Scotland, C. J. and Collett, J.

The defendant, in his written statement, alleged that the puttah tendered, being for trees, was not valid under any of the Sections of the Act. 1869. July 19. S.A. No. 512 of 1868.

The Acting Sub-Collector dismissed the plaint for the following reasons:—

In this case the acceptance of a puttah for certain palmyra trees is attempted to be enforced.

It appears that puttahs and muchilkas have never been tendered or exchanged on any previous occasion whatever.

In the absence, therefore, of any special agreement as to rent for the palmyra trees in question, the first objection in the defendant's answer is fatal to the plaint, for it nowhere appears in the Act that puttahs for anything except land are contemplated. In Section 4 (which provides for the contents of the puttah, &c.,) the words "the local description and extent of the land," and so in other Sections, preclude any wider interpretation of "rent," than rent for land.

Upon appeal, the Civil Judge held that the Act was solely directed towards the recovery of rent of land and did not provide for the recovery of such claims as the rent of topes and trees, and that the Sub-Collector therefore was right in rejecting the plaintiff's case.

The plaintiff preferred a special appeal to the High Court against the decree of the Civil Judge for the following reasons:—

As contrary to law in that,—

1st.—The Courts below were wrong in holding that a landholder could not issue puttahs to his tenants for the topes and trees which they hold under him according to the provisions of the Madras Rent Recovery Act VIII of 1865.

2nd.—Such persons come under the description of landholder and tenant in Section 1 of the said Act, and

1869. July 19. S. A. No. 512 of 1868.

there is no reason why puttahs and muchilkas should not be exchanged between them, as between the landholder and the other tenants holding lands from him.

Srinivasa Chariyar, for the special appellant, the plaintiffs.

Parthasarathy Aiyangar, for the special respondent, the defendant.

The Court delivered the following

JUDGMENT:— In this case both the Lower Courts have decided against the plaintiff's right to compel the acceptance of a puttah on the ground that under Madras Act VIII of 1865 there cannot be a puttah for anything except land, and that therefore acceptance of the puttah for palmyra trees in this case could not be enforced. We think this view is incorrect. There can be no objection to a puttah for rent, ascertained by the number of trees growing on land described in the puttah. We have not been able to ascertain in this case whether there is land adjoining to and forming part of the ground in which the trees grow for which the defendant pays separate rent. But if so, such land and its rent should be included in the same puttah, and the rent for the land and for the trees distinguished or lumped together as rent for land describing it as one piece of land. But if not the puttah may be for the rent of the trees describing the land on which they stand. We must direct the Civil Court to decide which is the proper form of puttah in accordance with this judgment and such puttah when tendered the defendant must be ordered to accept.

The parties will bear their own costs in this and both the Lower Courts.

Appellate Jurisdiction (a.)

Referred Case No. 19 *of* 1869.

VADAMALAI THIRUVANA TEVAR, ZEMINDAR OF SAITTUR......... } *Plaintiff.*

CARUPPEN SERVAI and another... *Defendants.*

A suit to recover the value of goods distrained for rent under Madras Act VIII of 1865 and forcibly carried away from the person distraining may be maintained in a Court of Small Causes under Section 27 of the Act.

The suit may be brought either by the landlord or the person authorized to distrain.

A petition and summons and an order, after hearing the parties and their evidence, appear to be the fitting mode of exercising the jurisdiction.

1869. *July* 19. *S.A. No.*512 *of* 1868.

THIS was a case stated under Section 22, Act XI of 1865, by P. Cabalya Pillai, the District Munsif of Strivilliputtur.

The following is the case stated:—

The plaintiff is a Zemindar and the defendants are the ryots in his zemindary. The object of the suit is to recover a lamp valued at Rupees five which the plaintiff had, through a duly appointed distrainer, distrained for arrears of rent due by the defendants, and which the 2nd defendant (the brother of the 1st) had forcibly carried away from the possession of the Cavalgar on the 14th January 1869, or to compel the defendants to pay the arrears due with interest amounting to Rupees 5-1-9. The plaintiff brings the suit under Section 27 of Madras Act VIII of 1865, alleging that the 2nd defendant has already been dealt with criminally and punished under the latter part of the Section. I have deferred bringing the plaint on the Small Cause Register of my Court pending the decision of the Honorable the Judges on the following questions, viz.—

First.—Is a Small Cause Court a Civil Court of competent jurisdiction within the meaning of Section 27 of the Rent Recovery Act abovementioned ?

(*a*) Present: Scotland, C. J. and Collett, J.

1869. July 19. S. A. No. 512 of 1868.

Second.—Who is the proper party to move the Civil Court under the above Section, the landholder or the distrainer ?

Third.—How is he to move the Court ? Is he to present a regular plaint drawn up on the prescribed stamp as is done in the present instance, or is he to present a mere petition ?

Fourth.—If the plaintiff is competent to make the application under the above Section, is he right in asking for either of two things, viz., the distrained property or the arrears due, instead of confining his prayer for the recovery of the former only ?

It appears to me that cases under Section 27 of the Rent Recovery Act should be brought before the ordinary Civil Court and not before a Small Cause Court, as they do not fall within the scope of Section 6 of the Small Cause Act No. XI of 1865.

Looking to the general provisions of the Act which hold the distrainer responsible for the safe keeping of distrained goods, and which give him abundant powers to deal with the said property, and looking also to the wording of Section 27 which provides for the restoration of distrained goods to the *distrainer*, I am inclined to think that the distrainer is the proper party to move the Court.

The Legislature having contemplated a summary proceeding, I think the application should be made by a petition drawn up on a stamp prescribed in that behalf.

With respect to the fourth question, I beg to remark that a party proceeding under the Section is bound to keep himself strictly to its provisions and cannot ask for anything beyond the restoration of the distrained goods.

No Counsel were instructed.

The Court delivered the following

1869. July 19. S. A. No. 512 of 1868.

JUDGMENT:—We are of opinion that it is competent to the Munsif's Court on its Small Cause side to exercise in this case the summary power given by Section 27 of the Madras Rent Recovery Act No. VIII of 1865. We read the words "any Civil Court of competent jurisdiction" as intended to import any Court which could take cognizance of a suit for the property taken away, and this the Munsif's Court on its Small Cause side would have had jurisdiction to do. The claim is "for personal property" and is not one in respect of which a suit can be brought before the Collector. It would therefore be cognizable in a suit under Section 6 of Act XI of 1865, and we infer from the statement of the case that no objection to the jurisdiction could be made to a suit under Section 8 of that Act.

With respect to the second and fourth points submitted, the general words of the Section seem to us to admit of the institution of the proceeding under it by either the landlord or the person authorized to distrain; and clearly the only claim that can be made is the restoration of the property once distrained and afterwards taken away.

As respects the mode of instituting the proceeding, we think the District Munsif's view is right. Looking to its nature and purpose and the provision in Section 75 exempting summary suits before Collectors from Stamp duties, the filing of a regular plaint could not have been intended. A petition and summons and an order of the Court after duly hearing the parties and their evidence, appear to us to be the fitting mode of exercising the jurisdiction.

Appellate Jurisdiction (a.)

Regular Appeal No. 12 *of* 1869.

L. VENKATASA NAIDU and 6 others...*Appellants.*

SADAGOPASAMY IYER and 3 others...*Respondents.*

The Committee of a District duly appointed under Act XX of 1863 are entitled to maintain a suit in the Civil Court without having obtained the leave of the Court to bring the suit as well when the object of the suit is to establish their right of control under Section 3 of the Act as when it is sought to enforce such control against the Officers of the temple subordinate to them.

1869. *July* 30. *R. A. No.* 19 *of* 1869.

THIS was a Regular Appeal from the decision of E. B. Foord, Civil Judge of Chingleput, in Plaint No. 15 of 1868.

The plaint was as follows :—

The plaintiffs in this suit seek relief as follows :—

That it be found and declared by decree of this Honorable Court, first, that the summary order of this Court made on the 16th day of September 1867, on Miscellaneous Petition No. 336 of 1867, be cancelled and set aside ; second, that the order of Injunction made by the Magistrate of this district forcibly ejecting plaintiffs from the Striveeraghavaswamy devastanum or temple situate and being at Trivalur and dispossessing them thereof, together with sundry jewels thereto, belonging on the 24th day of January 1867, is irregular and unauthorized, and the said order be annulled and cancelled, and that the said 1st, 2nd, and 3rd defendants be ejected therefrom and possession restored to plaintiff; third, that the liability and powers of the Executive Government and the Board of Revenue under Regulation VII of 1817 had not ceased or varied until Act XX of 1863 of the Imperial Legislature was enacted and passed into law ; fourth, that no act done or appointment made by the said authorities contrary to said Regulation prior to its repeal shall be held valid or binding on the plaintiffs ; fifth, that the powers

(a) Present : Scotland, C. J. Collett, J.

vested in the said Board of Revenue by the said Regulation had become legally vested in plaintiffs under the said Act XX of 1863 ; sixth, that the appointment of the 1st defendant as durmakurtah or warden by the said Board of Revenue was of the nature of a l ocal agent and not of the creation of a hereditary trusteeship, and therefore the said temple is of the class described in the 3rd Section of the said Imperial Act of 1863 ; seventh, that the plaintiffs, the legally constituted Committee of the Hindu Temple of Trivalur taluq, had on the 26th day of December 1866 and on a subsequent day, full authority and power to take possession of the said temple and its properties and for that purpose to enter therein, and that the possession then acquired was valid ; eighth, that the 1st defendant as local agent to the said Board of Revenue was bound to have voluntarily transferred the temple and all properties thereto belonging to the plaintiffs immediately on their appointment as Committee, and for default are liable to be ejected therefrom ; ninth, that the 1st defendant as such local agent or warden is liable to render an account of all properties belonging to the said temple and be directed and ordered to render such account ; tenth (subject to the fifth issue hereinbefore raised), that the plaintiffs possessed power of dismissal of the said local agent or warden and other servants of the said temple ; eleventh, that the defendants are liable to the full extent of the claim herein preferred.

The plaintiffs humbly submit that, under the powers vested in the Board of Revenue for the management of Hindu temples and religious endowments by Regulation VII of 1817, the said Board appointed the 1st defendant's predecessor a local agent otherwise called durmakurtah (warden) of the temple in litigation in this suit in or about the year 1842. Previously to such period, the management was carried out by the Collector under the Board's order,—the appointment of such durmakurtah was for the purposes of relieving the Government Officers of the performance of a duty not compatible with their profession of religion, but such act was not in violation or supersession of the siad Regula-

1869. July 30. R. A. No. 19 of 1869.

tions, and consequently did not create a hereditary trusteeship nor recognize 1st defendant's predecessor heir at law. Neither the 1st defendant nor his predecessors in office possessed hereditary or independent right of succession as durmakurtahs or wardens. Since the first appointment in 1842, the several durmakurtahs or wardens, including 1st defendant, exercised their functions subject to the rule and control of the Board of Revenue and the Collector of the district, and therefore the 1st defendant ever continued to be a local agent or warden. The plaintiffs further submit that the acts of the public authorities in respect of this temple were the acts of the Executive and not acts of the Imperial Government otherwise called acts of State.

The plaintiffs were lawfully nominated and appointed a Committee for the management of all the temples in the Trivalur taluq of this district on the 26th day of March 1866 and were furnished with a list of all the temples declared to be subject to their control and situate within the territorial limits of the said taluq, the temple in question being one of them.

Long previously to the 26th day of December 1866, sundry charges of malversation of temple property were preferred to the Government, the Board of Revenue, and the Collector of the district against 1st defendant, which were by indorsation referred to the plaintiffs. On a formal inquiry with due notice, the plaintiffs felt convinced of the truth of the charges and demanded of 1st defendant delivery of the temple and all its properties to them or their agent on 22nd June 1866. The 1st defendant consented and applied for three months' time to enable him to do so, but failed. Whereupon a further demand was made, and his agent (2nd defendant) represented that he had orders from his principal (1st defendant) to so deliver, and accordingly on the 26th and 27th days of December 1866 he formally delivered possession of the temple and several idols to their duly constituted agent or durmakurtah, but did not account for or deliver the jewels, documents, records, accounts, and other things, under the representation that the keys of certain rooms in which the jewels were lodged were with

his principal (1st defendant), and that on a future day they would be delivered: they also represented that the accounts, documents, and records had been accidentally destroyed by fire some months previously.

On the 28th day of December 1866, the 2nd defendant on behalf of the defendant preferred a complaint before the Magistrate of the district (4th defendant) against plaintiffs accusing them of trespass and forcible dispossession of the temple, whereupon the said Magistrate, under assumption of jurisdiction he had not, held sundry unjust and arbitrary proceedings, fined plaintiffs from 1st to 3rd and three of their clerks in the sum of rupees 1500 and dispossessed them under Section 318, Criminal Procedure Code, and prohibited them by injunction from the exercise of their lawful functions in that temple.

The plaintiffs sought proceedings in this Court to try the issue whether the temple in question was or was not of the class contemplated in Section 3, Act XX of 1863, of the Imperial Legislature, but the Court refused to raise and try the issue under the belief that the appointment made in 1842 by the Board of Revenue was of a hereditary nature, and made order accordingly on the 16th day of September 1867.

The plaintiffs sought again to raise issue under Section 3 of the said Imperial Act in Original Suit No. 5 of 1867 on the file of this Honorable Court in which 2nd and 3rd defendants filed the action against present plaintiffs for damages on behalf of 1st defendant in reference to their public acts as Committee of the said temple, but in consequence of the aforesaid order of 16th September 1867, they were not permitted by the Court to raise the issue, the Court holding that that order operated as an estoppel though not pleaded.

In consequence of the various illegal proceedings stated, the plaintiffs are compelled to bring forward this suit.

Upon perusing the plaint, and upon hearing the arguments adduced for the plaintiffs, the Civil Judge made the following

1869. July 30. R. A. No. 19 of 1869.

ORDER:—Permission to institute this suit under Act XX of 1863 having been already refused by the late Acting Civil Judge, by his order dated 16th September 1867, and the remaining subject matter of the plaint not constituting a cause of action, I must reject this plaint.

The plaintiffs appealed to the High Court against the order of the Civil Court on the following grounds:—

1. This is not a suit for which the previous permission of the Court to institute it is required by Act XX of 1863.

2. This suit is brought in respect of causes of action not mentioned in the said Act.

3. The suit is substantially a suit for possession of the pagoda and the property connected with it, and the plaintiffs were entitled to have their claim adjudicated upon in the ordinary way.

4. The plaint sets forth several *primâ facie* causes of action.

O'Sullivan, for the appellants, the plaintiffs.

Mayne, for the first respondent, the first defendant.

Srinivasa Chariyar and *Rama Row,* for the second respondent, the second defendant.

JUDGMENT:—This is a suit brought for the purpose—so far as we can understand the inartistically drawn plaint—of establishing the title of the plaintiffs under Section 3 of Act XX of 1863, and to recover possession of and control over the pagoda and the property thereto belonging, as also to make the defendants liable to certain damages claimed in the plaint. The Civil Judge rejected the plaint on the ground that leave to institute the suit had been before refused by his predecessor, and that the plaint showed no cause of action maintainable without leave.

We are of opinion that this decision cannot be upheld on the broad ground that leave was not necessary to the institution of the suit. The plaintiffs are undoubtedly

the Committee of the District appointed under the Act, and we think that the Sections of the Act relating to suits have no application to suits by properly appointed Committees as well when the object of the suit is to establish their right of control under Section 3 of the Act, as when it is sought to enforce such control against the officers of the Temple subordinate to them. This Court has already in two former cases reported in 3, *Madras High Court Reports, pp.* 334 *and* 198 considered the provisions contained in the several Sections and laid down this construction, and we see no reason for not following these decisions.

1869. *August* 2. *R. A. No.* 12 *of* 1869.

The result is that the order rejecting the plaint is improper and must be set aside and the plaintiffs left at liberty to file their plaint in the ordinary manner. The costs hitherto we think should be costs in the suit if proceeded with, one pleader's fee only being allowed to the respondents in the event of their being held to be entitled to costs. Should the plaint not be presented within two months from the date of this Court's order the parties will bear their own costs of this appeal.

Appellate Jurisdiction. (a)

Referred Case No. 25 *of* 1869.

MUNDY CHINNA COMARAPPA SETTI *against* RAMASAMY SETTI.

In calculating the period of limitation for bringing suits provided by Act XIV of 1859 the day on which the cause of action arose should be excluded from the computation.

THIS was a case stated under Section 22, Act XI of 1865, by H. P. Gordon, the Acting Judge of the Court of Small Causes of Chittoor in Suit No. 325 of 1869.

1869. *August* 4. *R. C. No.* 25 *of* 1869.

This case coming on for hearing, and the parties not appearing in person or by counsel, the Court delivered the following

(a) Present: Bittleston and Innes, J. J.

1869. August 4. R. C. No. 25 of 1869.

JUDGMENT:— The question referred for our decision is whether in calculating the period of limitation for bringing suits provided by Act XIV of 1859 the day on which the cause of action arose should be included; and our answer is that that day must be excluded from the computation.

Appellate Jurisdiction (a.)

Regular Appeal No. 14 of 1869.

VENKATASA NAIKER and 9 others............*Appellants.*

T. SRINIVASSA CHARIYAR, AGENT OF SRI SHATAGOPASAMY OF SRI AGOBALA MUTTUM AT TRIVELLORE, and another. } *Respondents.*

Regular Appeal No. 16 of 1869.

T. SRINIVASSA CHARIYAR, AGENT OF SRI SHATAGOPASAMY OF SRI AGOBALA MUTTUM AT TRIVELLORE, and another. } *Appellants.*

VENKATASA NAIKER and 9 others............*Respondents.*

The plaintiffs, describing themselves as the agent and gumastah of the hereditary durmakurtah of the Trivellore Pagoda, brought a suit for damages against the defendants, the Committee of the District appointed by virtue of Act XX of 1863, and their servants, for a trespass by the defendants in forcibly dispossessing them of the pagoda and the property therein and for the wrongful removal and retention of the property. The plaint stated that the defendants were punished criminally for the trespass by the Magistrate who, after enquiry under Sections 318 and 319 of the Criminal Procedure Code, restored the possession of the pagoda to the plaintiffs. The damages claimed were the value of jewels, cash, records, and accounts not restored; the expense incurred by the durmakurtah in the purification of the pagoda; the amount of counsel's and vakil's fees in the Criminal proceedings; and the amount of income received by the defendants during their possession during a festival held at the pagoda.

Held, that the plaint was brought by the plaintiffs personally and not on behalf of the plaintiffs by the durmakurtah through his recognized agents; that the plaintiffs were entitled to recover a moderate amount of damages for the wrong done to them in ejecting them from the pagoda; that the expenses incurred in the Criminal proceedings instituted by the plaintiffs were not recoverable as damages, such damages not being directly traceable to the wrong and its natural and necessary consequence; that the amount of income received by the defendants during the festival was a loss sustained by the durmakurtah and not by the plaintiffs personally, and that the plaintiffs had failed to make out the loss of property alleged.

(a) Present: Scotland C. J., and Collett, J.

Held also that, the evidence shewing that the acts of trespass by one of the defendants were for the benefit and on behalf of the members of the Committee and were afterward adopted and taken advantage of by them when they had acquired a full knowledge of those acts, the defendants for whose benefit the acts were done were liable for the trespass.

Semble, that an order of the Civil Court under Section 18 of Act XX of 1863 refusing leave to institute a suit and deciding that the Temple was governed by a hereditary durmakurtah and therefore within Section 3 of the Act was not conclusive upon the question of title between the parties.

1869. *August* 9. *R. A. Nos.* 14 & 16 *of* 1869.

THIS was a Regular Appeal from the decree of E. B. Foord, Civil Judge of Chingleput, in Original Suit No. 5 of 1867.

The plaint, filed on behalf of T. Srinivassa Chariar, the Agent to Sri Sadagopaswami of Sri Agobala Muttum at Trivallur, and Appasami Aiyengar, the gumastah of the said Sri Sadagopaswami, who is the Athinam Mirass Durmakurtah of Sri Viraragavasami's pagoda at Trivellore against 1 Venkitesa Naiker, 2 Minatchi Aiyar, 3 Srinivassa Ragava Chariar, 4 Gengadara Mudali, 5 Shanmuga Mudali, 6 Banal Kristnama Rajah, 7 Ragava Mudali, 8 Kandasawmi Mudali, 9 Ragava Naicker, 10 Ramasami Reddi, and 11 Srinivasa Royer, was for the recovery of certain gold and silver jewels, &c, worth rupees 32,814-10-2, which formed part of the property forcibly and fraudulently taken possession of by the defendants from the said pagoda of Sri Viraragava Swamiar and Athinam Sadagopaswami's mutt situated near the pagoda, which were in the 2nd plaintiff's possession as stated hereunder, and which were missing when the property was subsequently restored to the 2nd plaintiff by the Magistrate in due course, or the value thereof, rupees 32,814-10-2; the sum of ready money, rupees 64-5-3, which was kept therein; rupees 600, the expense of Sampratchani (purification) &c., incurred by the head of the mutt in consequence of the defendants having forcibly entered into the said pagoda and mutt; rupees 7,600, the amount of fees paid to Barristers for the criminal prosecution before the Magistrate and the Session Court against the defendants for their having forcibly entered as stated

1869. August 9. R. A. Nos. 14 & 16 of 1869.

above; the 34 bundles and records and 34 rolls of accounts of receipts and disbursements worth rupees 1,000 which belonged to the said pagoda, and were in the 2nd plaintiff's possession in the said mutt; rupees 8,000, being the loss of expense and loss of income sustained by the head of the mutt as he could not go abroad until the final disposal by the Original and Appellate authorities of the criminal prosecution conducted against the defendants as stated hereunder; and about rupees 110, the amount of hundi income realized on the new moon day in Margali (December 1866) of Achin (January 1867) which was forcibly taken possession of by the defendants, amounting in all to rupees 50,188-15-5, of which rupees 188-15-5 being relinquished and not required from the defendants, the balance is rupees 50,000. The amount of the suit is rupees 50,000.

The plaint set forth that the plaintiffs are agents of the Jeyar, or Superintendent of the pagoda and mutt (mentioned in the plaint) situated at Trivellore, and that the defendants from 1 to 6 are members of the Committee appointed under Act XX of 1863; that although the said Jeyar holds his office hereditarily, and is not subject to the control of the Government, the said defendants, by virtue of being members of the Committee aforesaid, endeavoured at first to interfere with his management of the said pagoda and mutt, by calling upon him to furnish them with accounts, and although he repeatedly informed them that he was not under their control, the 1st, 2nd, 3rd, 7th, 8th and 9th defendants, assisted by the other defendants illegally entered the said pagoda on the 26th December 1866, ejected the 2nd plaintiff, broke the locks of the rooms and took possession of the jewels and other property deposited therein, and on the following day, in like manner, entered and took possession of the said mutt and the property deposited therein; that although the 2nd plaintiff complained to 11th defendant (Sub-Magistrate,) he neglected to take cognizance of the complaint; that the 2nd plaintiff then complained to the District Magistrate, who convicted the 1st, 2nd, 3rd, 7th, 8th, and 9th defendants of the said criminal trespass,

(which conviction was confirmed by the Session Court in appeal), and on the 25th January 1867 restored the 2nd plaintiff to the possession of the said pagoda and mutt, and the property it contained, but that on 2nd plaintiff taking charge of the said property the gold and silver jewels and ready money mentioned in the list attached to the plaint, which formed part of the property deposited in the said pagoda and mutt when the defendants took unlawful possession, were found to be missing. Plaintiffs therefore sued to recover the said jewels or their value viz. rupees 32,814-10-2 rupees 64-5-3 in ready cash, rupees 600 costs incurred in purifying the pagoda and mutt after their pollution by the defendants, rupees 7,600, being costs incurred in prosecuting the defendants before the Magistrate and the Session Court, 34 bundles of accounts valued at rupees 1,000 and 34 bundles of accounts of receipt and expenditure, rupees 8,000 being loss of income incurred by the Jeyar during the time he was conducting the aforesaid prosecutions, and rupees 110, being the amount collected by public contributions during the festival of the new moon. Total amount claimed rupees 50,000.

The 1st, 2nd, and 3rd defendants, in their written statements, objected to the plaintiffs bringing the suit because they (plaintiffs) are only servants of the Superintendent of the temples. They denied that the Jeyar's office is hereditary, and asserted that he was subject to the control of the Government. They denied having taken wrongful possession of the pagoda and mutt in question and stated that by virtue of their office as members of the Committee appointed under Act XX of 1863, they removed the Jeyar from his office because he failed to furnish them with accounts of his receipts and expenditure on account of the said pagoda and mutt, and because they heard that he had misappropriated some of the property thereof, and that his gumastah, the 2nd plaintiff, delivered over the said pagoda to the 7th defendant whom the Committee had appointed as their gumastah, but they did not eject him there from; that he, the 2nd plaintiff, did not deliver any jewels or ready cash or accounts to them, an that therefore they

1869. August 9. R. A. Nos. 14 & 16 of 1869.

were not liable to account for the same; that they were not liable to pay the costs of purifying the pagoda (which ceremony was not in fact performed,) nor the loss of income claimed by the Jeyar, nor his legal expenses in prosecuting them in the Criminal Courts.

The following issues were framed:—

Whether the defendants did, as alleged in the plaint, illegally enter the pagoda on the 26th December 1866 and the mutt on the 27th idem, and whether they did then illegally take possession of the jewels, cash, ivory, and accounts, then stored or kept therein.

Whether at the time of the defendants' entry into the said pagoda and mutt the property set forth in the plaint was stored therein.

Whether when the Magistrate made over charge of the pagoda and mutt from the defendants to the plaintiffs, there was such a deficiency in the property stored therein as specified in the list attached to plaint.

Whether the plaintiffs are entitled to recover from the defendants each or any of the various items so specified by them in the plaint.

The Civil Judge found upon the evidence that the plaintiffs' claim to recover from defendants the jewels, cash, ivory, and accounts specified in the plaint had not been substantiated.

The remainder of the judgment was in the following terms:—

The evidence offered regarding the plaintiffs' alleged loss of income is of the vaguest description, and utterly inconclusive.

The only evidence regarding the amount alleged to have been expended in purifying the pagoda after its alleged pollution by defendants is that of plaintiff's 2nd and 4th witnesses who state that such a sum was expended, but no details are given, and the necessity for such an expenditure

is not even shewn. I think the defendants are bound to account for the amount actually collected at the festival of the new moon during the time they had possession of the pagoda, and I find this amount to be rupees 100. It now remains to be considered what should be awarded to plaintiffs as damages for the expense they were put to in prosecuting the defendants for criminal trespass before the Magistrate, and in defending the appeal made against that Officer's decision before the Criminal side of this Court.

My predecessor has already decided that the pagoda and mutt in question belong to the class of religious Institutions specified in Section 4 of Act XX of 1863, and that therefore they are not subject to the control of the Committee of which defendants from 1 to 6 are members. This decision was passed after the point had been fully gone into and argued by counsel on both sides, and I fully concur in that decision. Even supposing that the plaintiffs' master the Jeyar were subject to the control of the said Committee, the defendants, as members of that Committee, would not have been justified in summarily removing him from his office, and in taking forcible possession of the temples on the grounds they assert. They would at any rate have been bound before so doing to obtain clear proofs of his alleged malversation. But, arrogating to themselves a right which they did not possess, they summarily ejected his servants from the temples which he was in possession of, and are clearly bound to make good to him all the legitimate expenses he incurred in regaining possession. His legal expenses have, I think, been satisfactorily proved to amount to rupees 6,900, and this sum he is entitled to recover from the defendants, together with the amount proved to have been collected at the festival of the new moon which took place while they were in possession. I therefore adjudge that defendants do pay plaintiffs rupees seven thousand (7,000) with proportionate costs, I disallow the remainder of the claim.

Againt this decree both parties appealed to the High Court, the plaintiffs on the ground that the decree was

1869. August 9. R. A. Nos. 14 & 16 of 1869.

against the weight of evidence, and the defendants upon the following grounds :—

The 1st and 2nd plaintiffs are not entitled to sue on behalf of the Jeyar who resides in the district of Chingleput.

The Civil Judge ought to have given the defendants an issue upon the question raised in the written statement as to whether the pagoda and mutt belong to the class of temples or other religious establishments mentioned in Section 3 of Act XX of 1863.

The evidence shows that the defendants did not take forcible possession of the pagoda and mutt.

The damages decreed are not legally recoverable in this suit. If the Jeyar be entitled to any damages, the amount allowed on account of the legal expenses incurred in the Criminal proceedings is excessive.

O'Sullivan, for the appellants, the defendants in Regular Appeal No. 14 of 1869, and for the respondents, the defendants, in Regular Appeal No. 16 of 1869.

Mayne, Srinivassa Chariyar, and *Rama Row*, for the respondents, the plaintiffs, in Regular Appeal No. 14 of 1869, and for the appellants, the plaintiffs, in Regular Appeal No. 16 of 1869.

The Court delivered the following judgments :—

In Regular Appeal No. 14.—This is a suit by the plaintiffs, describing themselves as the agent and gumastah of the hereditary Athinam mirass durmakurtah of Sri Viraragava Swamy pagoda at Trivellore, to recover damages for a trespass by the defendants in forcibly dispossessing them of the possession of the pagoda and the mutt adjoining it and the property therein, and for the wrongful removal and retention of a portion of such property. The plaint in effect alleges the hereditary right of the Athinam mirass durmakurtah to the independent control and government of the pagoda as Trustee under Section 4 of Act XX of 1863, the appointment of the plaintiffs by Sadagopaswamy, the

1869. August 9. R. A. Nos. 14 & 16 of 1869.

present Athinam durmakurtah, for the care and management of the pagoda and the mutt, and the delivery over to the 2nd plaintiff as gumastah of the property belonging to the pagoda and mentioned in the schedules to the plaint; that while the plaintiffs were so in charge the defendants 1 to 6, the members of the Committee appointed for the taluk of Trivellore under Act XX of 1863, called upon the Athinam durmakurtah for the accounts of the pagoda, who denied his liability to account to them; that because of such denial, the 1st, 2nd, 3rd, 7th, 8th, and 9th defendants, on the 26th and 27th December 1866, entered the pagoda and mutt in a gang with the other defendants, violently took possession of the properties in the jewel-rooms, and ejected the plaintiffs and the servants of the pagoda; that on the complaint of the 2nd plaintiff, the said defendants were criminally punished for the trespass by the District Magistrate, and on the 25th January 1867, the same Magistrate, aftera n enquiry under Sections 318 and 319 of the Criminal Procedure Code, restored the possession of the pagoda and mutt to the 2nd plaintiff. In respect of those injuries, the damages claimed are the value of the jewels, cash, records, and accounts removed and not restored by the defendants, the expense incurred by the Athinam durmakurtah for purification of the pagoda and mutt, the amount of counsel's and vakil's fees in the Criminal proceedings, the loss of income sustained by the Athinam durmakurtah by reason of his inability to go abroad pending those proceedings, and the amount of income received on the new moon day in Margali of Achia. The whole amounting to rupees 50,000.

The 1st, 2nd, and 3rd defendants have, by their written statements, made the same defence. They aver that the Jeyar (the Athinam durmakurtah) was the person to sue and not the plaintiffs, and deny his independent hereditary right to the control of the pagoda and mutt and the appointments and delivery of possession as alleged by the plaintiffs. They claim for themselves and the other members of the Committee the trusteeship of the pagoda and property under Section 3 of Act XX of 1863, and

1869. August 9. R. A. Nos. 14 & 16 of 1869.

assert that as trustees they dismissed the Jeyar for breach of duty in regard to the accounts and disbursements of the pagoda and misappropriation of a portion of the property. They further aver that the 7th defendant as the gumastah of the pagoda appointed by the Committee had reported that the 2nd plaintiff and another gumastah had delivered up possession to him of the pagoda and the keys of the idol-rooms, and had promised immediate delivery of the keys of the jewel-rooms, and that they were not otherwise aware of the circumstance, and conclude with the denial of the alleged removal and retention of the pagoda property and of their liability to the damages claimed. The 4th and 5th defendants by their written statement pleaded merely that if the trespass complained of were true they did not assist in committing it; but it appears from the record that they as well as the 6th to 10th defendants at the hearing adopted the defence set up by the 1st, 2nd, and 3rd defendants. The issues recorded raise all the points of that defence except the question of the right of the Committee as Trustees under Section 3 of Act XX of 1863 to the supervision of the pagoda and its property. That question the Civil Judge considered to be concluded by the opinion of his predecessor recorded in his order of the 21st April 1868. On the issues he has found that the plaintiffs were forcibly dispossessed by the defendants of the pagoda and mutt, but that the defendants had not removed and retained any of the jewels or other property of the pagoda, and, as respects the damages claimed, that the plaintiffs were entitled to recover only the expenses of the Criminal proceedings and the sum collected at the festival of the new moon, in all rupees 7,000, and that sum the defendants have been decreed to pay.

The objections now relied upon in the appeal by the defendants are (1) that the Jeyar was the only person who had a right to sue for the injuries complained of; (2) that the question of the right of the Committee under Section 3 of the Act should have been raised and tried; (3) that the evidence did not prove the alleged forcible dispossession; (4) that the sums decreed to the plaintiffs are

1869. *August* 9. *R. A. Nos.* 14 & 16 *of* 1869.

not recoverable as damages, and (5) that the 7th defendant is the only person liable in the suit.

As to the 1st point.—We cannot construe the plaint otherwise than as brought by the plaintiffs personally, and not, as was suggested on behalf of the plaintiffs, by the Jeyar through his recognized agents. The question then is whether the plaintiffs are the proper persons to sue for the alleged causes of action. In relation to this question, we may at once say in regard to the third point that we think the evidence shews beyond reasonable doubt that the dispossession of the plaintiffs was by coercion, and there is no doubt that they were at the time in actual charge of the pagoda, the mutt, and the property therein. Now, assuming the Committee to have the title they claim, the above facts are sufficient to afford the plaintiffs a good cause of action. Consequently on the second point we are of opinion that the Civil Judge rightly declined to raise an issue as to the title of the Committee. The only way in which such a question of title could be contended to be material would be with reference to any item of damages claimed by the plaintiffs, and in this case such a contention could only be set up with reference to the item claimed on account of the fees received by the defendants at the new moon festival. But such fees have been received as a direct consequence of the trespass by the defendants, and but for their wrongful act would (had the plaintiffs been continued in office by the Jeyar) have been rightfully receivable by the plaintiffs. Whether they are recoverable by the plaintiffs in the present suit is quite another question to be noticed presently.

But before we pass to the fourth point, it will be convenient to dispose of the fifth objection that the 7th defendant is the only person liable for the forcible dispossession. By some singular omission, there is certainly a curious deficiency of evidence to connect the other defendants immediately with the acts of trespass by the 7th defendant; for there is little room for doubt that such connection could have been easily shown. But we think this omission is prevented from being fatal to the case as against the

1869. August 9. R. A. Nos. 14 & 16 of 1869.

defendants, other than the 8th and 9th defendants, by the evidence showing clearly that the acts of the 7th defendant were for the benefit and in behalf of the members of the Committee (defendants 1 to 6,) and were afterwards not only adopted and taken advantage of by them, but upheld and defended when, in the course of the Criminal proceedings, they had acquired a full knowledge of the nature of those acts. But the same cannot be said as to the 8th and 9th defendants because the acts of the 7th defendant were in no sense for their benefit or use.

With respect to the fourth point, we are clearly of opinion that the expenses incurred in the Criminal proceedings instituted by the plaintiffs are not recoverable as damages. In an action of trespass, a wide latitude is no doubt permissible in assessing damages, but nothing can be claimed on account of actual loss unless such loss is directly traceable to the wrong and is its natural and necessary consequence. Here, obviously, the Criminal proceedings were a purely spontaneous act on the part of the plaintiffs, so far as regards their cause of action in the present suit; and as to the remedy sought and obtained under the Criminial Procedure Code, if it were necessary to decide the point, we should probably hold that the Sections 318 and 319 of the Criminal Procedure Code had been erroneously applied by the Magistrate. The case of *Foxall* v. *Barnett* 2 *E. and B*, 928, cited on behalf of the plaintiffs, is distinguishable from the present case. There the loss allowed was a necessary and direct consequence of the wrong complained of.

Then, as to the remaining item of rupees 100 allowed on account of the fees received by the Committee on the new moon festival, the objection arises that this is not a damage sustained by the plaintiffs personally. Although if continued in office by the Jeyar they would have received the fees, and been accountable for them to their principal, yet, having been wrongfully kept out of possession and prevented receiving them and so not accountable for them, the loss, if any, has been sustained by the Jeyar and not in any

1869. August 9. R. A. Nos. 14 & 16 of 1869.

way by the plaintiffs. The amount of them therefore has been improperly allowed to the plaintiffs.

These observations render it unnecessary to notice the argument put forward in behalf of the plaintiffs, that the former order of the Civil Court of the 21st April 1868 was conclusive upon the question of title between the parties; but it must not be supposed that we think there is any sound foundation for the argument.

The result is that the plaintiffs are entitled to recover against the defendants 1 to 7 a moderate amount of damages for the wrong done, in ejecting them from the pagoda and mutt, unless in their cross appeal they should succeed in establishing their right to recover one or more of the items disallowed by the Civil Court.

In Regular Appeal No. 16.—This is the cross appeal by the plaintiffs just referred to, and the question is whether the evidence shows that the defendants during the time that they were in wrongful possession of the pagoda removed and have retained the jewels and property to the value of rupees 32,000 and odd as alleged in the plaint.

[Upon the evidence on this point, the High Court were of opinion that the plaintiffs had failed to make out the loss of the property alleged, and the appeal was dismissed.]

The result of both appeals is that the plaintiffs are entitled, as we have said above, to recover a moderate amount of damages, and we think that the sum of rupees 100 is a proper amount to award. As to costs, we think that the plaintiffs should bear all their own costs of the Appeal No. 14, and pay the costs of the defendants on the 7,000 rupees disallowed; and that in Appeal No. 16, the parties should bear their own costs in the appeal. In the Lower Court, the defendants 1 to 7 will pay one-tenth of the plaintiffs' costs and will bear all their own costs. As against the 8th and 9th defendants, the suit will be dismissed, but nothing need be said about their costs in the Court below, as they have not incurred any distinct costs.

Appellate Jurisdiction (a)

Special Appeal No. 58 *of* 1869.

KONNAPALEN UTHATCHADAYAN HAJE............... } *Special Appellant (3rd Defendant.)*

PEROTTA MELODEN RAMEN NAMBIAR.................. } *Special Respondent (Plaintiff.)*

An agreement to take an oath by the parties to a suit filed in Court is not an adjustment by mutual agreement or compromise within the meaning of Section 98 of the Code of Civil Procedure.

The defendants agreed that a decree should be passed against them if they failed to perform an agreement by which they bound themselves to take an oath, the terms of which were set forth in the agreement, and one of them failed to take the oath. The Lower Courts thereupon passed a decree for the plaintiff.

Held by the High Court that the procedure of the Lower Courts was not sanctioned by law.

1869. *August* 14. *S. A. No.* 58 *of* 1869.

THIS was a Special Appeal against the decision of G. D. Leman, the Acting Civil Judge of Tellicherry, in Regular Appeal No. 293 of 1867, confirming the decree of the Court of the Principal Sadr Amin of Tellicherry in Original Suit No. 44 of 1867.

J. H. S. Branson, for the special appellant, (the 3rd defendant).

O'Sullivan, for the special respondent, (the plaintiff).

The facts appear sufficiently from the following

JUDGMENT:—In this suit the Principal Sadr Amin passed a decree in the plaintiff's favor, because the 2nd defendant had failed to take an oath at a pagoda according to an agreement entered into between the parties before the suit came to a hearing

Upon appeal, the Civil Judge confirmed that decree; but we think that the Lower Courts were not justified in so disposing of the suit.

There is no doubt that the parties and their vakils did execute a written agreement whereby the plaintiff on the one hand agreed that his suit should be dismissed with costs if the 2nd defendant on a certain day before a certain

(a) Present: Bittleston, and Innes, JJ.

pagoda should swear according to the usage of the pagoda that the statements in the plaint were untrue, and if the 3rd defendant should take a like oath before a certain Mosque, and the defendants on the other hand agreed that a decree should be given according to the plaint, if either the 2nd or 3rd defendant should fail to take the prescribed oath.

Upon this agreement being filed, it appears that the Principal Sadr Amin issued a commission to a Commissioner to see that the oaths were taken according to the agreement, and that upon the Commissioner reporting that the 2nd defendant had refused to take the oath, a decree was at once passed in the plaintiff's favor, the case not being posted for re-hearing, and the 3rd defendant objecting to the decree.

The Lower Courts have acted in this case in conformity with an old practice which as to District Munsifs was based upon Regulation VI of 1816, Section 27, and as to Zillah Courts upon Regulation III of 1802, Section 6, but these enactments are repealed, and the Courts no longer possess the power of following that procedure, as was pointed out in the Madras High Court Proceedings, 3rd March 1868 (4th Volume, High Court Reports "(Rulings)" p. iii.)

In those Proceedings an observation was added that "there is nothing to prevent the Courts, if they have the "means, from facilitating a settlement of this nature by "the parties, by satisfying themselves that the necessary "conditions are fulfilled," but we do not suppose that it was intended by this remark to sanction the issuing of such a commission as was issued in this case, for which the Civil Procedure Code certainly furnishes no authority. Nothing more was meant, we apprehend, than that if the Courts could, without any departure from the provisions of the Code, furnish any facilities to the parties for adjusting the suit by this mode of settlement, there was nothing to prevent them from doing so. But the question which we have to consider is whether this suit has been disposed of in a manner sanctioned by

1869. August 14. S. A. No. 58 of 1869.

the Code. Now it was admitted by Mr. O'Sullivan, on behalf of the special respondent, that unless the case is brought within the 98th Section of the Code, the procedure adopted cannot be justified. That Section provides that, if a suit shall be adjusted by mutual agreement or compromise, such agreement or compromise shall be recorded and the suit shall be disposed of in accordance therewith, and the question is whether this suit was adjusted by mutual agreement or compromise, so that it could be disposed of in accordance therewith. We think that what is meant by this language is that the parties should agree upon some terms respecting the subject matter of the suit, which are capable of being embodied in a decree, whereby the suit would be disposed of. In the present case there certainly was no such agreement but only an agreement that, if the defendants should do certain things, a decree should be passed in favor of one party, and if they should fail to do those things then in favor of the other party; so that what decree should be passed would depend upon the result of an inquiry, whether subsequently to the agreement certain acts had or had not been performed. The suit was not adjusted by the agreement, and the decree which was passed was admittedly not a decree by consent. It was a decree passed against the strong objection and protest of the 3rd defendant the present appellant; and we think that having been given without any investigation of the merits, and not in accordance with any procedure sanctioned by law, it must be set aside, and the case restored to the file of the Principal Sadr Amin for investigation on the merits.

We do not, however, think the appellant entitled to costs, for it certainly was his own agreement which led to the procedure of which he now complains.

Appellate Jurisdiction (a)

Special Appeal No. 595 *of* 1868.

RAMANADAN CHETTY ....*Special Appellant.*

VIJIASAMY *alias* NAMASIVAYA TAVER .... } *Special Respondent.*

Special Appeal No. 167 *of* 1869.

RAMANADAN CHETTY...................... *Special Appellant.*

VIJIASAMY *alias* NAMASIVAYA TAVER .... } *Special Respondent.*

In a suit under Section 15 of of the Registration Act of 1864 (XVI of 1864) to compel the defendant to join in the registration of certain documents, the defendant admitted the execution of the documents but set up a collateral agreement which would render the documents of no legal force. The Lower Courts found that the agreement relied on by the defendant was come to with the plaintiff.

Held, (reversing the decrees of the Lower Courts) that, execution having been admitted, the document ought to be registered.

THIS was a Special Appeal against the decision of E. C G. Thomas, the Civil Judge of Madura, in Regular Appeals Nos. 157 and 158 of 1867, confirming the decrees of the Court of the Principal Sadr Amin of Madura in Original Suit Nos. 17 and 18 of 1866.

1869. *August* 26. *S.A. Nos.* 595 *of* 1868 *and* 167 *of* 1869.

This suit was brought under Section 15, Act XVI of 1864, to compel the defendant to register a deed of sale executed by him in the plaintiff's favor for the sum of rupees 4,000 conveying to him the nunjah and punjah lands belonging to the defendant in the village of Sethurayanan-dul. The plaintiff also produced the endorsement of the District Registrar declining to register the bill of sale in consequence of the defendant's refusal to acknowledge it.

The defendant filed a written statement objecting to register the bill of sale in question, as the whole amount of the consideration for which it was executed was not paid to him, and as it was passed by him to prevent his incarceration in the debtor's jail on the eve of being sent thither on account of a judgment-debt due to the plaintiff in

(a) Present: Scotland, C. J. and Innes, J.

1869. August 26. S.A. Nos. 595 of 1868 and 167 of 1869.

Original Suit No. 31 of 1862 on the file of the Civil Court. He added that, on the date on which the bill of sale in question was executed, it was stipulated between the plaintiff and defendant that it was to have no force or effect whatever should the amount for which it was passed be paid to the plaintiff within 30 days from the said date; and that as the money was tendered by defendant within the stipulated period but was refused by the plaintiff, the bill of sale above referred to is void.

The issues settled were:—

Whether the circumstances under which the deed of sale in question was passed are such as to vitiate it.

Whether the amount of 4,000 rupees referred to in the said instrument was offered by the defendant within the stipulated time.

The following is taken from the judgment of the Principal Sadr Amin:—

But as regards the alleged stipulation to cancel the sale on the payment of the amount of 4,000 rupees within one month from the date of the bill of sale, I have to observe that it is proved by the evidence of the mutual witness that such stipulation was made between the plaintiff and defendant; and his testimony is corroborated by the defendant's 1st and 2nd witnesses, of whom the former is the plaintiff's vakil; and considering the relation existing between him and the plaintiff, I have every reason to believe that the sale was conditional and was not concluded on the date on which it took place. The offer of payment of the amount of 4,000 rupees is also established. The mutual witness says that on the evening of the last day of the period allowed for the purpose, the defendant's servant, 2nd witness Sangu Servai, brought a bundle containing silver coins and laid the same in the entrance of the said witness's house, and that at his desire the said Sangu Servai communicated the arrival of the funds to the plaintiff's vakil who had been authorised by the plaintiff to receive the money and return the deeds of sale

in dispute both in this and the following No. 18. The plaintiff's vakil (the 1st witness for the defence) admits that he was made aware of the arrival of the funds from Shevagunga, but states that it could not be received, as the plaintiff was not in the town, and was not seen till after the fourth day after the period of one month above referred to had expired. As the plaintiff's vakil admits that he had full authority from his client to receive the money if tendered within the limited period, and he omitted to receive it unless it was paid in the plaintiff's presence, I do not think that the defendant's interests should suffer by the carelessness of the plaintiff to make arrangements for receiving payment according to the terms of the stipulation above referred to. On considering carefully all the circumstances connected with the case, I think that the defendant had done all he can to act up to the terms of the agreement in question, and that the studied absence of the plaintiff from the town and the want of decision on the part of his vakil had prevented the defendant's servant from making the payment. On this view of the case, I consider that the deed of sale must be held to have been cancelled, and therefore decline to direct the defendant to register it. The plaintiff will pay all costs.

The decision was confirmed on appeal by the Civil Judge.

The plaintiff specially appealed to the High Court on the ground that,—

As the original suit was brought simply to compel the defendant to register the bond mentioned in the plaint, and as the defendant admitted the execution of the said bond and receipt of the consideration therein mentioned, the Lower Court ought to have directed the said bond to be registered.

J. H. S. Branson, for the special appellant, (the plaintiff.)

The Court delivered the following

1869. August 26. S.A. Nos. 595 of 1868 and 167 of 1869.

JUDGMENT:—These were suits brought to compel the defendant to join in registering certain documents executed by him in favor of the plaintiff which the District Registrar had refused to register in consequence of the defendant having denied execution of them. The defence made in both suits was not a denial of the execution of the documents but that the consideration money had not been paid in full; that the execution by the defendant had been obtained on the eve of his being sent to jail to prevent his incarceration, and that a contemporaneous agreement was made stipulating that the instruments were to have no force or effect whatever should the amount for which it was executed be paid to plaintiff within 30 days from its date; and that as the money was tendered but refused by plaintiff, they were of no further binding force. The issues recorded in each suit raised the points of the defence and the Principal Sadr Amin found that this collateral agreement had been come to; that the money was tendered and refused by the plaintiff's agent; that the agreement therefore had ceased to have any binding force, and that it would be improper to register it; and a decree was thereupon passed dismissing the suit with costs. The Civil Judge on appeal confirmed this decision.

The plaintiff has appealed, and the objection relied upon is that the defence set up had been improperly entertained, and that registration of the instruments should have been ordered.

We are of opinion that it was not competent to the Principal Sadr Amin to enter upon the question of the existence and effect of the collateral agreement. The suit was properly brought to establish the plaintiff's right to enforce registration, and that only, and the instruments were not admissible in evidence except for the purpose of determining as to that right. Now the single question upon which under Section 29 of the Act such right depended was, whether the instruments were executed by the parties by whom they purport to have been executed, and that fact having been admitted by the defendant, registration

should have been directed without entertaining any question as to the validity or operation of the instruments—See the case of *Khadar Saib* v. *Khadar Bibi*, 3 *Madras High Court Reports*, 149. It makes no difference that the questions decided by the Lower Courts arose out of the defence, registration being essential to admit of the Courts looking at the terms of the instruments in order to see their nature and effect.

1869.
August 26.
S.A. Nos. 595 *of* 1868 *and* 167 *of* 1869.

For these reasons, we must reverse the decrees of the Lower Courts, and, as the execution of the instruments has been admitted by the defendant, the decrees in the appeals may at once direct the Registrar to register the instruments. Plaintiff's costs throughout must be paid by the defendant.

Appellate Jurisdiction (a)

Regular Appeal No. 34 *of* 1869.

KULLAPPA NAIK and another..................*Appellants.*

RAMANUJA CHARIYAR and 11 others..........*Respondents.*

Regular Appeal No. 61 *of* 1869.

COLLECTOR OF MADRAS..............................*Appellant.*

RAMANUJA CHARIYAR and 11 others..........*Respondents.*

The plaintiffs sued, as the mirassidars of a village, to establish their right to the grant of a puttah of certain waste lands of the village which had been granted to some of the defendants. The Collector, who was made a defendant, stated that the Hookumnamah Rules of the District directed that land should be given to mirassidars on their tendering sufficient security, and that the plaintiffs on previous occasions had received lands for which offers had been made by others in consideration of the plaintiffs' preferential right, but that they had failed to cultivate the lands or pay the assessment in breach of their agreements.

Held, that the plaintiffs were entitled to the relief sought for.

THESE were Regular Appeals against the decision of E. B. Foord, the Civil Judge of Chingleput, in Original Suit No. 29 of 1867.

1869.
August 31.
R. As. Nos. 34 *and* 61 *of* 1869.

(a) Present: Scotland, C. J. and Innes, J.

1869.
August 31.
R. As. Nos.
34 and 61 of
1869.

The plaint set forth that the plaintiffs and the defendants from 3 to 31 are the mirassidars of the divided village of Pillapaukum; that contrary to the usage of the district, the 1st and 2nd defendants caused a lease of certain waste lands in that village to be issued in their names by the Collector in Fusli 1269, notwithstanding that plaintiffs raised objections thereto and bound themselves to pay the full assessment of those lands. Plaintiffs therefore sued to eject the 1st and 2nd defendants and defendants from 32 to 66 who occupied portions of the said lands, and to have the lease cancelled.

The defence was that the lease was lawfully granted by the Collector with the plaintiffs' consent, and that the village in question was an undivided one.

The supplemental defendant (the Collector) pleaded that the issue of the lease to the 1st and 2nd defendants was in accordance with the hookumnamah of the district which directed that leases should only be granted to mirassidars upon their tendering good and sufficient security; that the plaintiffs had, on previous occasions, in consideration of their preferential rights as mirassidars, been granted leases of lands applied for by poyacarries, but had always failed either to cultivate the lands or pay the assessment thereon, although they had entered into written agreements to pay the assessment whether they cultivated the lands or not, and that such being the case, his predecessor, Mr. Shubrick, was justified in granting a lease to the defendants.

It was admitted at the first hearing by the pleaders on both sides that it made no difference to their respective clients whether the village in which the disputed lands are situated is divided or undivided.

The plaintiffs' pleader admitted that, unless the plaintiffs had agreed to cultivate the said lands, the Collector had authority to grant a lease to the defendants.

Defendants' pleader admitted that the plaintiffs are the mirassidars of the village.

The Civil Judge gave judgment for the plaintiffs as follows after stating the evidence :—

It is admitted that the plaintiffs, being the mirassidars, had a preferential right to have the lands in dispute leased to them, provided they agreed to pay the assessment, whether they cultivated them or not, and to give security for the payment of the same.

That they were willing to comply with all those terms is clear from exhibits A, B and C, and it remains to be determined whether under such circumstances the supplemental defendant, the Collector, was justified in rejecting their offer and in granting a lease to the other defendants.

I am of opinion that he was not, for the following reasons. The only ground he assigns in his written statement is that on previous occasions they had failed to fulfil their agreements to cultivate certain lands which his pleader admits are not the same now in dispute. He does not say that he considered the security tendered insufficient. That it was in fact ample seems clear from the statement of the 3rd (joint) witness, the Kurnum, and from the Tahsildar's urzi C.

The terms on which waste lands should be leased to mirassidars in this district were laid down in a Despatch from the late Honorable Court of Directors to the Government of Madras, dated 28th July 1841, and the late Provincial Court declared in their decree dated 15th December 1841 that the law on the subject was in accordance with that Despatch.

The written statement of the supplemental defendant shows that those rules were still in force when the cause of action arose.

For the above reasons I am therefore clearly of opinion that the supplemental defendant was not justified under the circumstances of the case in granting the lease to the other defendants, and that he was bound under the rules in force in the district to grant it to the plaintiffs.

1869. August 31. R. As. Nos. 34 and 61 of 1869.

Gordon, for the appellants, the 1st and 2nd defendants in No. 34.

Srinivassa Chariyar, for the respondents, the 1st, 3rd, 4th, 7th, 8th, 10th, 11th, and 12th plaintiffs in No. 34.

Handley (Government Pleader) for the appellant, the 67th defendant in No. 61.

Rama Row for *Srinivassa Chariyar*, for the 11th respondent, the 11th plaintiff in No. 61.

The Court delivered the following

JUDGMENT :—The plaintiffs in this suit and the defendants from No. 3 to No. 31 are the mirassidars of the village of Pillapaukam, in the zillah of Chingleput, and have brought the suit to establish their right to the grant of a puttah of certain waste lands in the village of which the 1st and 2nd defendants were in occupation as Sugavasi tenants under a puttah granted to them by the Collector, and to obtain the issuing of a puttah to them and the eviction of the 1st and 2nd defendants. They rest their claim on the ground that, as mirassidars, they have a right to the pre-occupancy of waste lands as against strangers who apply to become tenants of such lands for cultivation upon giving sufficient security for the payment of the full revenue assessment, and that they had tendered such security before the puttah was granted to the 1st and 2nd defendants.

The 1st and 2nd defendants and the other defendants claiming under them pleaded and at the trial relied upon the right of the Collector to grant the puttah to them, notwithstanding the objections of the plaintiffs and the other mirassidars. The Collector, upon being made a supplemental defendant, put in a written statement which sets forth that the land was given to the 1st and 2nd defendants as durkhastdars for the protection and security of the Government revenue ; that the proceedings in that respect were in keeping with the Hookumnamah Rules of the district which directed that lands should be given to mirassidars on their tending sufficient and trustworthy security;

1869. August 31 R. A. Nos. 34 & 61 of 1869.

that the plaintiffs as the mirassidars of the village had, on previous occasions, competed for lands for which offers had been made by Poyacarries and were allowed to take them up *in consideration of their preferential rights*, but they had failed to cultivate the lands or pay the assessment in breach of their agreements to do so, and consequently the late Collector (his predecessor) had not in the mirassidars that security for the due and punctual payment of the Government revenue that the interests of Government demanded.

The recorded issues raised the question whether the Collector had authority in the circumstances of the case to grant the lease to the 1st and 2nd defendants, and at the trial the case on both sides was rested upon the admission contained in the Collector's written statement and repeated and accepted by the vakils of the contesting parties that the mirassidars had a preferential right to a tenancy of the land in dispute on entering into an agreement to pay the revenue assessment whether they cultivated or not and giving sufficient security for the payment of the same. The evidence on the part of the plaintiffs was confined to shewing that such agreement and security had been duly tendered before the grant of the puttah to the 1st and 2nd defendants, and on the part of the 1st and 2nd defendants and the Collector the only evidence adduced was in proof of the averment in the Collector's written statement that the plaintiffs had failed to cultivate the waste lands granted to them on a former occasion and to pay the assessment thereon. The Civil Judge was of opinion that this default was no ground of defence, and considering it proved that the proper agreement and sufficient security had been tendered, he decreed the relief prayed in the plaint.

From that decree the Collector and the 1st and 2nd defendants have brought the present appeals, and the ground on which it is sought on their behalf to invalidate the decree is that the plaintiffs as mirassidars have not a preferential right to the occupancy of waste lands which the Collector is bound to recognise. The Civil Judge's conclusion in regard to the tender of the proper agreement

1869. August 31. R. A. Nos. 34 & 61 of 1869

and sufficient security is not objected to, and it is conceded that the refusal to entertain the plaintiffs' application because of their breach of a former agreement was not sanctioned by any authoritative rule or custom. We are of opinion that it is not open to the appellants now to set up that the mirassidars have no right whatever to claim the occupancy of waste lands. Their preferential right subject to the conditions already stated has been deliberately and distinctly admitted, and on that admission the suit was heard and determined by the Civil Court. If on the part of the Government a Judicial decision as to the right of pre-occupancy is desired, the question may be properly raised in another suit when the mirassidars will have the opportunity, to which they are entitled, of adducing evidence of custom in support of their claim.

For these reasons the decree of the Civil Court must be affirmed with costs.

Appellate Jurisdiction. (a)

Regular Appeal No. 40 *of* 1869.

GOLLA CHINNA GURUVUPPA NAIDU......... *Appellant.*

KALI APPIAH NAIDU and another..........*Respondents.*

The plaintiff brought a suit on an instrument, dated 1861, described as a mortgage bond, to recover the amount due by a decree against the first defendant personally and against the mortgaged property which was in the possession of the 2nd defendant under a registered deed of sale by 1st defendant to him in 1866. The Civil Judge gave a decree against the 1st defendant, but refused the prayer against the 2nd defendant on the ground that he was a *bona fide* purchaser for valuable consideration without notice.

Held, by the High Court, that the plaintiff was entitled to a decree against the property in the possession of the 2nd defendant for satisfaction of the debt, whether the instrument sued on was a mortgage, or whether its effect was merely to create a lien.

1869. September 3. R. A. No. 40 of 1869.

THIS was a Regular Appeal against a decision of E. F. Eliott, the Acting Civil Judge of Chittoor, in Original Suit No. 33 of 1866.

The suit was brought to recover rupees 3,000 under certain mortgage bonds.

(a) Present. Bittleston and Innes, J. J.

The plaint set forth that 1st defendant owed plaintiff a sum under a mortgage bond, which, with ready money received, amounted to rupees 3,000, for which on the 27th November 1861, 1st defendant executed on stamp paper a mortgage bond promising to pay the same at 1,000 rupees a year, with interest on the principal at 1 per cent. per mensem, and mortgaging what was mortgaged in the former mortgage bond, viz., 1st defendant's 10 and odd cawnies of tope land in Ayalam village, and nunjah lands and wells pertaining thereto; that 1st defendant had paid nothing but was making dilatory promises, and that as he had made over the mortgaged property to 2nd defendant, this suit had been brought against 2nd defendant also to recover the debt by means of the property mortgaged; that out of the amount of the aforesaid bond for 3,000 rupees, 1,000 rupees due on the 1st instalment was relinquished as affected by lapse of time, and the balance remaining is 2,000 rupees, and the interest thereon from date of bond was rupees 1,016-9-0. Relinquishing therefore rupees 16-9-0, the balance left is 1,000 rupees, and the total 3,000 rupees, which sum, together with further interest and costs, the plaintiff sued to be recovered to him by means of the mortgaged property and from 1st defendant, and that 2nd defendant's interference might be prevented in rendering this mortgaged property liable.

The 1st defendant allowed the case to be tried *ex-parte.*

The 2nd defendant contended that he did not know 1st defendant executed a document to plaintiff mortgaging his lands, fruit trees, &c., or if he owed any debt, neither was his knowledge of the same alleged in the plaint; that 1st defendant sold to 2nd defendant for rupees 2,000 (1,200 rupees being formerly due and 800 then received) his punjah lands measuring cawnies 10¼ with two wells thereon and fruit trees situated in the village of Ayalam, which had been in 1st defendant's possession and enjoyment; that on the 23rd May 1866, 1st defendant executed a sale-bond to 2nd defendant and had it duly registered, and that he also presented a razinamah to the circar

1869. September 3. R. A. No. 40 of 1869.

for the transfer of puttah to 2nd defendant's name; that 2nd defendant purchased this tope and lands for their proper value and was in possession and enjoyment of the same ever since; and that plaintiff's demand to make them liable to his claim was illegal and invalid.

The following issues were settled by the then Judge Mr. C. A. Roberts :—

Whether the plaintiff's document of 1861 is genuine?

Whether 2nd defendant is liable to plaintiff's claim under the document aforesaid?

The following is extracted from the Judgment of the Civil Judge :—

The vakils of both parties stated that as the documents on either side are not disputed by the other side nor by 1st defendant, and as either party only pleads ignorance of the execution of the document of the other party, there was no apparent necessity to examine evidence on the 1st issue, and accordingly they dispensed with the same.

It appears to me that the point for decision is—which claim has the preference? In point of priority of date there can be no doubt that the mortgage bond of the plaintiff is the prior document, but I am of opinion that this fact alone is not sufficient in itself to give it the preference especially considering that the defendant is in admitted possession and enjoyment of the property by his deed of sale. Either party to the suit pleads entire ignorance of the execution of the document of the other party, and the 1st defendant has tacitly admitted the claims of both parties by having not disputed either claim but allowed the case to be heard *ex-parte*. Further, the plaintiff has nowhere alleged that defendant was aware of the mortgage which is equivalent on his part to a tacit admission that he (2nd defendant) was not aware, and it is clear from his plea of ignorance of the deed of sale that he himself could not have made 2nd defendant aware or given him notice of the mortgage. The presumption therefore is in favor of 2nd defendant's plea that he was a *boná fide* pur-

chaser for a valuable consideration without notice supported by the fact of his being in possession of this property claimed. Still it has been ruled by the Judgment of Privy Court in *Seth Sam* v *Luckpathy Royjee Lallah* in 9. *M. I. Ap.* that conceding that such "a purchaser would have an equity superior to that of plaintiff, still such innocent purchase must not be merely asserted but proved in the cause." Such being the case, it remains to look to the proof. On this point I am of opinion that the circumstantial evidence before me is sufficient to establish the innocence of this purchase. The facts, that the property was purchased for a proper value ; that the 2nd defendant is and has been ever since in possession ; that the deed of sale has been registered ; that the 1st defendant has not denied or disputed this document, nor has plaintiff discredited or impugned it ; that ignorance or "without notice" has been the plea pleaded by this defendant which has not been at any time denied or discredited by plaintiff, nor has the plaintiff at any time alleged to the contrary that this defendant was aware and had notice,—all these are in favor of the presumption of the innocence of his purchase, and, as far as I can see, no other evidence can be available in proof of a negative pleading such as absence of knowledge as well as of notice. I consider that it was either for the plaintiff or the 1st defendant to give notice. The former having pleaded ignorance of the execution of this document certainly could not have done so, and the 1st defendant by withdrawing from this suit and not denying or refuting either claim shows that he did not do so either, and clearly it was not his object to do so, and therefore this affords the strongest presumption of the innocence of the purchase which, if considered proved, establishes an equity superior to that of the plaintiff. The 1st defendant in this case, I consider, to be chiefly responsible for this fraudulent conveyance, inasmuch as he has obtained money from both parties on this land and has imposed on both—in the case of plaintiff by selling it without his knowledge when he had a mortgage lien upon it, and in the case of 2nd defendant by selling it to him without notice, and when in reality at the time he had no right, title, and interest in

1869. September 3. R. A. No. 40 of 1869.

it to part with. The saving fact, however, in favor of 2nd defendant is that it was an innocent purchase and without notice which I find it to be, and as such it cannot be held liable in my opinion to plaintiff's claim notwithstanding the plea set up by the plaintiff of "*Caveat emptor.*"

For these reasons I find for the plaintiff in the amount sued for as against 1st defendant personally, but not as against this property, which together with 2nd defendant, I exonerate from all liability to this suit. All costs to be borne by the 1st defendant.

The plaintiff appealed to the High Court.

Rungaiya Naidu, for the appellant, the plaintiff.

Rama Row, for the 2nd respondent, the 2nd defendant.

The Court delivered the following

JUDGMENT:—This is a suit on an instrument dated 27th November 1861, described as a mortgage bond, to recover the amount due by a decree against the 1st defendant personally, and also against the mortgaged property which is in the possession of the 2nd defendant under a registered deed of sale by 1st defendant to him in 1866.

On the hearing before the Civil Judge, the plaintiff's mortgage and the defendant's deed of sale were admitted; and excepting those documents no evidence was given on either side, but on behalf of the 2nd defendant it was argued that he was a purchaser for valuable consideration without notice, and that the property which he had purchased could not be held subject to the plaintiff's mortgage. The Civil Judge was of that opinion and made a decree accordingly, directing that 1st defendant should pay the amount due, but that 2nd defendant and the property purchased by him should be exonerated from the plaintiff's claim.

In support of this decree, we were referred to the decision of this Court in Regular Appeal No. 32 of 1865, not reported,

and if we take only the language of the Judgment in that case, it is difficult to distinguish it from the present; for the decree of the Civil Judge in that case dismissing the suit was upheld on the ground that the plaintiff was attempting to enforce a mere hypothecation against a purchaser for valuable consideration without notice—it being said that the English decisions on this subject should be followed as clearly tending to advance justice. We have no doubt that in that particular case the application of the rule was in furtherance of justice, but we are not prepared to say that it necessarily would be so in every case, and the facts of this present case are totally different from those found by the Civil Judge in Regular Appeal No. 32 of 1865. In that case the Civil Judge found that the 1st defendant, a *boná-fide* purchaser for value without notice had been in sole and independent enjoyment of the lands in question for ten years prior to the document under which the plaintiff claimed a lien and 16 years before the suit; that the alleged lien was fraudulent, collusive, and illegal, and that the plaintiff had been guilty of laches. In the present case the Civil Judge finds in effect that both plaintiff and 2nd defendant are innocent parties both of whom have been imposed upon by the 1st defendant—"in the case of the plaintiff (as he expressly puts it) by selling it without his knowledge when he had a mortgage lien upon it, and in the case of the 2nd defendant, by selling it to him without notice, and when in reality at the time he had no right, title, and interest in it to part with." If this be a correct view of the facts of the case, we find it difficult indeed to understand why the plaintiff should be deprived of that security which the 1st defendant had given to him, and the 2nd defendant be confirmed in a right which the 1st defendant could not give him.

If, however, the distinction between a mortgage and a hypothecation of land is to be adverted to, we are not prepared to say that the document on which the plaintiff sues, or the earlier document referred to therein, is more than an instrument of hypothecation; and the case therefore falls within the very terms of the judgment in

1869. September 3. R. A. No. 40 of 1869.

Regular Appeal No. 32 of 1865, but we have no doubt at the same time that the parties to those documents intended that they should give to the plaintiff a perfect and complete right to have the lands in question made available for satisfaction of his debt in case of need; and we cannot but think that equity and good conscience (which is our rule of decision) require that he should not be deprived of that right unless he can be shown to have been guilty of some negligence whereby the 2nd defendant may have been more easily imposed upon in the matter of his purchase from the 1st defendant.

Further, one of the Judges (Mr. Justice Innes,) who took part in that decision has for some time been of opinion that the proposition was stated too broadly, and the other Judge (Mr. Justice Holloway) in a previous reported case in which he was considering the nature of the contract of hypothecation as applied to land, held that it gave an interest in immoveable property, for (he said) it is clear that any subsequent sale must be made subject to it (2, *Madras High Court Reports*, *p.* 54).

There is still another reason why we do not feel ourselves bound to apply to this case the rule mentioned in Regular Appeal No. 32 of 1865, which is this-that a full Bench of the High Court of Calcutta have come to a directly opposite decision, not unanimously, but by a majority of Judges of whom the Chief Justice was one (*Vol.* 5 *Calcutta W. R. for* 1866, *Civil Rulings, page* 61).

The facts of that case very closely resembled the present, and the plaintiff was held entitled to enforce an unregistered instrument creating a lien upon land against a subsequent purchaser for value without notice whose deed of sale was registered. In his case, too, the non-registration of the plaintiff's mortgage is the only fact tending to show any negligence on his part, but the Calcutta High Court considered that the document creating the lien was not a deed of mortgage which he was bound to register under Act XIX of 1843, Section 2, and though in this respect there is an apparent conflict between that decision and the decision of this Court in Referred Case No. 80 of

1864 (2. *M. H. C. Rep. page*. 108), for this Court treats the instrument of hypothecation as a mortgage deed, it is to be observed that this Court only held that the instrument of hypothecation was one which could be registered under Section 3 of Regulation XVII of 1802 ; and that Section includes amongst the instruments of which the registration is optional " all limited assignments and generally all con- " veyances used for the temporary transfer of real property."

It is clear from Section 3 of the Act XIX of 1843 that there are instruments affecting title to land or some interest in the same other than the deeds of sale or gift or mortgage mentioned in Section 2, as to which the Legislature has declared that they are not to be in any respect void for want of registration ; and those no doubt include the instruments of which registration is declared to be optional by the Regulation XVII of 1802, Section 5, and as to which it is by that Section enacted that the not registering them shall in no wise operate to the prejudice of the rights of the parties thereto. Practically, it seems to us, that the question is reduced to this. Either the instrument on which the plaintiff relies is a mortgage, meaning thereby an instrument whereby the interest of the mortgagor in the land mortgaged to the full extent of the debt intended to be secured thereby is transferred to the mortgagee whether actual possession of the land mortgaged be or be not given to the mortgagee, in which case non-registration would render the mortgage void as against a subsequent registered mortgagee, though not as against a subsequent registered sale, and the defence of purchase for valuable consideration without notice would be inapplicable because the plaintiff would be pursuing a legal remedy upon a legal title. Or if the instrument can only be properly construed as one not transferring any estate or interest in the land but creating simply a lien or charge, unaccompanied with any right of possession, the registration would at most only be optional, and if so, the non-registration is not to prejudice the rights of the parties, and the plaintiff cannot be charged with neglect and deprived of his lien on account of his omission to register. We would add only, as to the obser-

1869. September 3. R. A. No. 40 of 1869.

vation in the Judgment of the Privy Council to which the Civil Judge in the present case refers, that it does not purport to be even an expression of opinion on this subject.

Under the circumstances of this case therefore, and in the existing state of the authorities, we do not feel ourselves prevented from doing what justice seems to us in the present case to require, viz, giving to the plaintiff the benefit of his security upon the land of which the 2nd defendant has possession. That the plaintiff's documents are genuine and *bona fide* and given for valuable consideration, is not in the slightest degree disputed in this case, and it is unnecessary therefore to remand the case to the Civil Judge for any investigation on those points. The decree already directs payment of the amount due by the 1st defendant, and so far it is not objected to and must stand; but so much of it as exonerates the mortgaged property from liability must be reversed, and the decree must direct that the said property be made available for satisfaction of the said debt. The costs of the appellant in the Lower Court were ordered to be paid by the 1st defendant, and we do not interfere with that part of the decree. As to the costs in this Court, we think it reasonable that each party should bear his own.

Appellate Jurisdiction (a)

Referred Case No. 14 *of* 1869.

PANDURUNGY ANNACHARIYAR and another

against

IYATHORY MUDALY and another.

The defendant was sued as the Trustee of a pagoda to recover a certain sum of money for which he had not accounted. The defendant was dismissed by three members of the District Committee, which consisted of six members, the other three members refusing to sign the order of dismissal. The plaintiffs were appointed trustees in place of the defendant by the members who dismissed the defendant.

Held, that the appointment of the plaintiffs was invalid, and that that they were not entitled to sue the defendant.

THIS was a case referred for the opinion of the High Court by R. Vassudeva Row, the District Munsif of Mannargudy, in Suit No. 100 of 1869. 1869. *August* 9. *R. C. No.* 14 *of* 1869.

The case as stated was as follows:—

This is a suit brought for the recovery of rupees 16-11-11, the same being the value of a certain piece of teakwood belonging to the pagoda which the 1st defendant while acting as trustee entered in the pagoda accounts as sold to the 2nd defendant on the 27th June 1866, but which has not yet been paid for.

The 1st defendant admits having made the entry in the accounts, and the fact of the pagoda being entitled to the plaint amount, but he denies that the 2nd defendant bought the piece of wood, which he says he has himself otherwise disposed of. The 1st defendant chiefly contends, 1stly, that the plaintiffs are incompetent to sue on behalf of the pagoda, inasmuch as their appointment to the office of Trustee by three out of six members of the Pagoda Committee of the Tanjore Circle is illegal and therefore invalid.

2ndly, that no suit can lie against him while he is still in office, as his dismissal by the Committee is invalid; because, having been appointed by all the six members of the

(a) Present: Innes, and Collett, J. J.

1869. August 9. R. C. No. 14 of 1869.

Committee, he cannot be removed by only three of the said members, and because the said dismissal has not been based on good and sufficient grounds.

The 2nd defendant denies having bought the piece of wood.

The case came on for hearing before me on the 1st day of March 1869, and was adjourned for further consideration, subject to decision of the High Court upon the following case:—

Under Act XX of 1863, the Local Government appointed six members to serve on the Committee for the Tanjore Circle, which includes the Rajagopalsawmy pagoda at this station. They entered upon their duties, and all the six members signed an order appointing the 1st defendant as a trustee of the pagoda. He took charge of the pagoda and carried on the duties for a few years, when three members of the Committee signed an order dismissing the 1st defendant from his office of trustee upon certain grounds therein specified, and appointed the two plaintiffs in his stead. The plaintiffs affirm and the 1st defendant denies that the dismissal of the 1st defendant is for a good and sufficient cause. The plaintiffs have been managing the affairs of the pagoda. The 1st defendant contends that he has not yet made over charge of the pagoda to the plaintiffs, and that he still continues in the management thereof which, he has not proved. Under these circumstances, the plaintiffs sue for the recovery of rupees 16-11-11. The 1st defendant admits the truth of the claim, but only denies the competency of the plaintiffs to sue and his liability to be sued because the plaintiffs have been illegally appointed, and because he has been improperly and unjustly dismissed. I have made no inquiry, nor have I at all considered the point as to whether there are good and sufficient grounds to warrant the removal of the 1st defendant by the Committee.

Upon the foregoing facts, I am of opinion that the plaintiffs are fully competent to sue the 1st defendant as they have done in this case. It appears that Madras Regulation VII of 1817 was applicable to the pagoda in

question, and the nomination of the punchayet rested with the Board of Revenue on the date on which Act XX of 1863 was passed. It is admitted that the 1st defendant himself was appointed by the Tanjore Committee some time after their nomination. The High Court have ruled that a Committee appointed under Act XX of 1863 have power to dismiss the Trustees described in Section 3 of the Act without having recourse to a civil suit—vide page 334 of the *Madras High Court Reports, Volume* III. The said Act is no doubt silent as to the number of members who are to form the quorum for the transaction of business, but still Section 7 provides that the Committee shall consist of three or more persons and shall perform all the duties imposed on such Board, &c., and consequently I consider that the appointment of the plaintiffs and removal of the 1st defendant by three out of the six members of the Committee are quite legal, and that the same must be held good until cancelled by the decree of a competent Court. The fact of the 1st defendant having been appointed by six members of the Committee cannot, I consider, incapacitate the required number of members of the said body from acting against him and removing him from office. The 1st defendant alleges that his dismissal by three of the members is illegal, because it was against the will of the remaining three members of whom one appears to have since died, so that it is of no use to ascertain the opinion of the two other surviving members, inasmuch as the three members who have acted in the matter constitute the majority at present.

The question, therefore, for the decision of the High Court is, whether the appointment of the plaintiffs and the dismissal of the 1st defendant by three out of the six members of the Tanjore Committee, while the 1st defendant had been originally appointed by all the six members, are legal and valid under Act XX of 1863, so as to entitle the plaintiffs to sue the 1st defendant in respect of property belonging to the pagoda in question.

No Counsel were instructed.

The Court delivered the following

1869.
August 9.
R. C. No 14
of 1869.

JUDGMENT:—The plaintiffs, as Trustee of the Rajagopalasamy pagoda, sue 1st defendant and another, the dismissed trustee, for the value of certain timber belonging to the temple which he disposed of while trustee, and for which he has not accounted.

First defendant, while admitting the debt, pleaded that he was not lawfully dismissed and was still trustee and not liable therefore to account to plaintiffs; also that plaintiffs were incapable of suing him, as they had not been lawfully appointed trustees. First defendant was, it appears, dismissed by three out of a Committee of six who had been duly appointed under Act XX of 1863. The other three considered that there were no sufficient grounds for dismissal of 1st defendant and declined to sign the order dismissing him. The same three who dismissed 1st defendant appointed plaintiffs, the others again dissenting; and the question for decision is whether this dismissal and appointment by only three of the Committee are valid.

The District Munsif is of opinion that they are so, because Section 7 of Act XX of 1863 provides that a Committee may consist of three or more members. The question, however, is not whether, if the Committee had consisted of only three members, that number would have been sufficient to pass these orders, but whether, the Committee consisting of six members, three out of that number can overrule the other three.

There might perhaps have been sufficient to form a quorum in the absence of the other members; but as the case is stated, every member of the Committee voted. Without deciding whether the Committee must not be unaminous in dismissing or appointing a manager or trustee of a temple, we are clearly of opinion that at least there must be a majority of the Committee assenting to such dismissal or appointment, and that consequently the appointment of the plaintiffs in the present case was invalid, and they are not entitled to sue the defendant.

Appellate Jurisdiction (a)

Referred Case No. 8 *of* 1869.

CHETU NARAYANA PILLAY,

against

AYAMPERUMAL AMBALOM and 5 others.

The defendants entered into a contract with the plaintiff in writing, by which in consideration of the trouble taken and large sums of money advanced by the plaintiff on behalf of the defendants, the defendants promised that they would from generation to generation pay to the plaintiff rupees 100 per annum out of a specified fund. The plaintiff brought a suit to recover a sum within the pecuniary jurisdiction of the Small Cause Court under the written contract.

Held, that the Small Cause Court had jurisdiction to entertain the suit, and that the undertaking of the plaintiff to forbear from enforcing the debt due to him prior to the contract was a sufficient new consideration to support the contract.

Held also that on the death of one of the co-contractors the whole liability to the plaintiff attached to the surviving co-contractors.

THE following case was referred for the opinion of the High Court by J. R. Daniel, the Acting Judge of the Court of Small Causes of Madura, in Suit No. 2,034 of 1868.

1869. *September* 3. *R. C. No.* 8 *of* 1869.

This suit was brought to recover rupees 389-2-2, due under the following agreement dated June 19th 1861.

"This is an agreement dated 19th June 1861, or 7th "Ani of the year Dunmadi, executed by 1 Ayamperumal "Ambolom, son of Danukodi Ambalom, 2 Chittren Samba-"notti, 3 Kuppayan Sambanotti, 4 Muttunambiyan Samba-"notti, 5 Mutukarpen Sambanotti, and 6 Chokalingam "Sambanotti, son of Pachayan Sambanotti of Karayur, in "Ramasweram, to Shetunarayana Pillai, son of Kalimuttu "Pillai of Paumben.

"In consideration of the trouble taken and large sums "( ) of your own money spent on our behalf "in relieving us from the annoyance to which we had been "subjected by the Mussalmans and others of Ramesweram "demanding a share in our fishing at Karayur sea-port and

(a) Present: Scotland, Chief Justice, and Collett J.

1869. September 3. R. C. No. 8 of 1869.

"preferring complaints against us in the Offices of the "Magistrate, &c., we shall from generation to generation "(Putrapoutraparamparyam) pay you and your descendants "(Santati) rupees 100 per annum from out of three-fourths of "the fees (brokerage) which may be collected from the mer- "chants at one or two annas per rupee on the price (accord- "ing to the quality or size) of Sudai and other fish that may "be caught by the use of the six dhonies belonging to "us and others, the remaining one-fourth share of the said "fees being appropriated to the service, &c., of the Mariam- "men Covil. If more is collected, you will have no claim "whatever. If we shall fail to pay the above sum of "rupees 100 every year, we shall be responsible from our "own property. This was executed with our own free-will. "One rupee stamp not being procurable, two stamps at "eight annas each have been purchased, and on one of "which this agreement has been drawn, while the other is "used merely as an additional stamp.

"(Marked) Ayamperumal Ambalom.

"As the share which we used to give to the Mussul- "mans of Rameswaram was discontinued to be given by "your exertions, if any of us and others get dhonies, we "shall join them with us and pay you as abovesaid."

(Marked) Ayamperumal.
(„) Chittren Sambanotti
(„) Kuppayan Sambanotti.
(„) Muttunambeyan Sambanotti.
(„) Muttukarupen Sambanotti.
(Signed) Chokalingam Sambanotti.

Attested by

(Marked) Thillakutty.
(„) Velludian of Rameswaram.
(Signed) Chinniah Pillai, son of Chinnavampillai of Rameswaram.

I, Babamia *alias* Moor Moidheen Sáheb, son of Shaik Baboo Sáheb of Paumben, have written this in the presence of those who have subscribed."

1869.
September 3.
R. C. No. 8
of 1869.

The defendants 1 and 4 admitted the execution of the agreement, the remaining defendants denied the agreement. It has, however, been proved by the attesting witnesses, and I entertain no doubt of its genuineness.

The 6th defendant, Manar Karupan, was not a party to the agreement, but was included as the heir of Kuppayan, one of the obligors (deceased). This Kuppayan has, however, left a son; the 6th defendant is his son-in-law, and was made a party on the ground that he had succeeded to the boat of the deceased Kuppayan. Even this, however, has not been established, and he can in no way be held liable.

The pleader for all the defendants pleads.

I. That the Court has no jurisdiction because the agreement involves an eventual payment of more than rupees 500.

II. That the agreement is void and not enforceable because

1. There is no consideration.

2. If there is, it is so grossly inadequate as to amount to fraud.

3. The consideration is past and cannot, therefore, support the promise.

4. The agreement is not binding upon the heirs of the contracting parties, and as the contract is not divisible, it must be wholly null and void.

5. It is a restraint upon trade, inasmuch as the defendants can only relieve themselves from the obligation of paying by giving up their trade as fishermen.

4. The case was heard before me on the 12th day of February 1869, and a decree has been passed in favor of the plaintiff subject to the opinion of the High Court upon the following case:—

The six contracting parties are fishermen of the village of Karayur, and it appears that in 1861 and previously certain Mussulmans claimed a right to fish in that part of

1869. September 3. R. C. No. 8 of 1869.

the sea where the defendants were in the habit of fishing and, as an acknowledgment of that right, claimed a per-centage of one out of every ten fish caught; this led to disputes between the Mussulmans and defendants before the Magistrate, who ordered the Mussulmans not to interfere, as the sea was common, and they could have no such right as they claimed; the plaintiff assisted the defendants, in prosecuting their claim before the Magistrate, and in consideration of the trouble taken and the money expended, the defendants executed this agreement promising to pay rupees 100 annually, and also binding their heirs to pay the heirs of the plaintiff. This rupees 100 was to be paid out of a fund made by a small per-centage paid by merchants buying the fish in addition to the price of the fish.

5. As regards the plea of want of jurisdiction, I was of opinion that this Court had jurisdiction, as the amount claimed is within rupees 500; that the plaintiff had a complete cause of action for the annual payments in arrears (*High Court Reports, Volume* II, *page* 469.)

6. Regarding the 2nd plea that the contract is void, I was of opinion that it was not legally void as regarded the contracting parties, but that it could not bind their heirs.

As to want of consideration, the agreement itself shows that there was consideration, viz. large sums of money paid by plaintiff on their behalf and the trouble taken by him to free them from the illegal exactions.

I was of opinion that the consideration was not so grossly inadequate as to render the contract void, though it is undoubtedly a foolish one. The plaintiff himself cannot tell the exact sum of money he expended. He says roughly rupees 1000, probably a great exaggeration. It was expended on batta to witnesses, fees to vakils, food to the defendants, who, he says, were fed by him for some time whilst the dispute was going on, and also in hire to coolies for dragging the nets, because the Mussulmans had combined to prevent the regular coolies from working for the defendants. Though therefore the amount cannot

be determined, the expression in the document itself "much money" shows that a considerable sum was expended; and though it would have been better had they agreed to pay a fixed sum, they have chosen to make annual payments, and I do not think that the consideration is so grossly inadequate as to render the agreement void. The defendants have, from that time to this, been undisturbed in their fishing.

As to consideration being past.

It is laid down in Chitty on Contracts that a past or executed consideration is not sufficient to support an *assumpsit* unless such consideration was moved by the precedent request, express or implied, of the party promising. In the present case, the plaintiff acted and spent his money not voluntarily, but at the request of the defendants.

The plea that because the contract is not binding on the heirs of the obligees, therefore it cannot bind the obligees themselves, appears to me unsustainable.—An agreement to pay a certain per-centage out of the profits can scarcely be considered an agreement in restraint of trade; it is not an agreement that they will not exercise their trade as fishermen.

I was therefore of opinion that the contract was binding upon the contracting parties, but not upon the heirs. The annual payment is to be made out of a certain fund, and only if the defendants fail to apply the proceeds of that fund will they be liable personally. As this fund is an uncertain one and difficult to ascertain the execution of the decree would be difficult, but this is a consideration which cannot affect the decision.

The questions for the decision of the High Court are

1. Whether a Small Cause Court has jurisdiction to try this case or not?

2. Whether the contract is valid and can be enforced?

3. Whether, if it is binding on the obligees, is it also binding upon their heirs; and if not binding upon the heirs, whether the surviving obligees would be compellable

1869. September 3. R. C. No. 8 of 1869.

to pay the whole sum of rupees 100, or only their proportionate share deducting the share of those deceased ?

No Counsel were instructed.

The Court delivered the following

JUDGMENT :—The suit being for a debt alleged to have accrued due under the contract and within the pecuniary limit of the jurisdiction of Courts of Small Causes, was clearly cognizable by the Court.

The second question submitted involves two points (1) Whether there was a good and sufficient consideration to support the promise of the defendants ; (2) Whether the contract was illegal as being in restraint of trade. The latter point we may dispose of with the single observation that the written instrument contains no stipulation imposing the least restraint on trade. As to the first point, we take it to be the fact that at the time the plaintiff made the advances and rendered the services to the defendants, no undertaking had been come to that he was to participate in the sale proceeds of the fishing business. That the advances and services were simply made at the request of the defendants and not gratuitously.

That being so, a *complete* implied contract to repay such advances and give the plaintiff a reasonable remuneration for his time and labor existed at the date of the execution of the written instrument, and reasonably in such a case the law requires some new good consideration to support a second express contract imposing a different liability. If it were otherwise, there would be, as was observed in the case of *Hopkins* v. *Logan* 5 *Mees. & Wells.* 249, two varying promises on one consideration.

And in the present case we think there is a sufficient new consideration. An undertaking to forbear from enforcing a valid debt for a certain time is clearly a good consideration and such an undertaking appears. The effect of the agreement was to bind the plaintiff to forbear from suing as he might at any moment have done, for a year, and then only for a fixed sum on account, and the same

in regard to the next instalment, and so on. Our opinion therefore is that the contract is a valid one. 1869. *September* 3. *R. C. No.* 8 *of* 1869.

With respect to the second of the two points submitted in the third question, we are of opinion that, on the death of one of the co-contractor, the whole liability to the plaintiff attached to the surviving joint co-contractors, and that the plaintiff was entitled to the general judgment which has been passed against them.

Upon the other point we can say not ing, as it has not arisen in the suit. It may hereafter arise in a suit brought by the plaintiff against the legal personal representative of either of the joint debtors or by the defendants or some of them for contribution.

Appellate Jurisdiction. (a)

Referred Case No. 20 *of* 1869.

K. SANJEEVIYAH, *against* NANJIYAH.

A suit does not lie to enforce a liability specifically by the decree of a Civil Court in the Mofussil, the right of suit in such case being taken away by Section 11 of Act XXIII of 1861.

THIS was a case stated under Section 22, Act XI of 1865, by P. Terumul Row, District Munsif of Purghi. 1869. *September* 6. *R. C. No.* 20 *of* 1869.

The case was as follows:—

This is an action to recover the sum of rupees 29-0-3 being the amount of principal and interest of a decree of this Court in Original Suit No. 73 of 1863, under date the 19th February 1863.

The facts of the case are these:—

The plaintiff sued the defendant for the recovery of rupees 16 on a bond in Original Suit No. 73 of 1863 on the regular file of this Court, and obtained a decree on the 19th February 1863. On the 20th January 1865, the plaintiff moved, in decree Execution Case

(a) Present: Scotland, C. J. and Innes, J.

1869. September 6. R. C. No. 20 of 1869.

No. 287 of 1865, for the execution of the said decree, but the application was withdrawn on the 21st February 1865 without any satisfaction, and no step was subsequently taken, up to this date, to enforce the decree, for the amount of which the plaintiff now sues. He states that as (under Section 20, Act XIV of 1859), he could not apply for the execution of the decree, in consequence of no proceedings have been taken to enforce the decree within three years before this, he has instituted the present suit; and that as this suit is brought (although on the decree which was passed more than six years back,) yet within six years from the date of the last proceedings in the Execution Department, his suit is not barred by the Law of Limitation.

On perusal of the plaint, and Sections 2 and 32 of the Code of Civil Procedure, and Section 11, Act XXIII of 1861, and questioning the plaintiff's vakil, I thought it desirable to submit the following questions for the opinion of the Honorable Judges of the High Court before I admit and register the plaint, as the nature of this suit is so new that none of this kind has been hitherto instituted in this Court, and I wish to be well prepared to dispose of the case before it comes for trial.

Question I.—Can a suit be brought for the amount of a decree ?

Question II.—If a suit can be brought, what is the time limited by law, and from what date the period is to be computed, whether from the date of the decree, or from the date of the subsequent proceedings in Execution Department ?

With reference to the first question, my opinion is as follows :—

The High Courts of Calcutta and Madras are unanimous in deeming that an action to recover a judgment-debt is maintainable, and it is similar to an action to recover a debt created by Statute (vide *Thomson's Commentary on the Limitation Act, p.* 243 ; and *Madras Jurist, vol.* IV, 127). Now, I only doubt as to whether or not these rulings are

applicable to the Mofussil Courts: true, the Privy Council in the case of *Gopeemohan Thakoor and others* v. *Rajah Radhanath*, where the guardian and agent of a minor Zemindar borrowed money to pay the arrears of the revenue of the minor's estate, and gave a bond upon which a decree was passed in the Supreme Court, for the amount of which one of them was also kept in Jail, held that the decree-holders could recover the judgment-debt from the Zemindar, after he attained the full age, by a suit in the Mofussil Civil Court (*Sutherland's Privy Council Judgments, p.* 8.) But as this judgment is passed so far back as 1834, I doubt as to whether or not the law (such as Act XXXIII of 1852) to facilitate the enforcement of judgments in places beyond the jurisdiction of the Court was then in force. If the rulings of the High Courts abovementioned are applicable to the Mofussil Courts, whether or not the Court can interfere with the judgment of the former suit if it appear necessary in the course of trial? If the Court in the second suit is *not* to interfere with the former decree, even in such instances as I now proceed to narrate, I think the second suit is not maintainable.

1869. *September* 6. *R. C. No.* 20 *of* 1869.

The plaintiff by his own neglect or mistake failed to endeavour to keep the decree alive by reviving through the proceedings in Execution Department within the limited period, and could not therefore move for its execution under Section 20, Act XIV of 1859; (and at the termination of the period the law presumes conclusively that the claim is satisfied). The subject matter of the present suit is one doubtless tried and determined and one that could not be re-opened under Section 2 of the Code of Civil Procedure as observed by Mr. Kindersley, the Judicial Commissioner of Mysore, in his judgment in a case quite similar to the present one, "that a person was "not liable to be sued a second time, and that such a suit "could not be brought, the matter having become "*res-judicata* could not be tried again." (*Madras Jurist*, III, 267.) Then Section 11, Act XXIII of 1861, strictly prohibits the institution of a separate suit in regard to the execution of the decree passed between the same parties. If, with all these hostile provisions of the law, the plaintiff

1869. September 6. R. C. No. 20 of 1869.

is allowed to sue on an alleged unsatisfied decree, in my humble opinion, I think the defendant also can be allowed to set up any plea either against the justification of the former decree and the genuineness and validity of the documents, &c., merged therein if the decree is passed on *ex-parte* trial, and the defendant had had no opportunity of availing himself of the provisions under Section 119 of the Code of Civil Procedure, or against the enforcement of the former decree now sued on, on the ground of its being satisfied through (private) adjustment, but not certified to the Court under Section 206 of the Code of Civil Procedure. Under the Judgment of the High Court in Referred Case No. 11 of 1866 (*Madras High Court Reports*, III, 188) the decree-debtor cannot sue the creditor by a separate suit for the money that he paid out of the Court for the decree, the amount of which the creditor levied from the debtor through the process of the Court. If this ruling debars the defendant also to plead and prove the private adjustment of the decree on which he is again sued, it will be hard on the part of defendants. The law must protect both parties from all abuses and injuries. When the plaintiff is allowed to bring his suit on a decree which cannot be executed solely on plaintiff's exceeding or neglecting the provisions of the law, I think the defendant also must be allowed in the second suit to plead and prove the private satisfaction of the decree, which he could not do in Execution Department on the ground of his neglecting the provision of the law. Again, I think the Court can interfere with the former decree, for *Baron Parke* (*in the case of Williams* v. *Jones*, 13 *M.* and *W.* 628 quoted by both the High Courts of Calcutta and Madras in their rulings abovementioned) says; "The "principle on which this action is founded is, that where a "Court of competent jurisdiction has adjudicated a "certain sum to be due from one person to another, a legal "obligation arises to pay that sum on which an action of "debt to enforce the judgment may be maintained. It is "in this way that the judgments in Foreign and Colonial "Courts are supported and enforced, and the same "rule applies to inferior Courts in this country, and "applies qually whether they be Courts of record or not,

From the words that the rule in regard to the Foreign judgments is applicable to such cases, I see no reason why the rule of evidence in respect of Foreign judgments "that a Court which is called on to enforce a foreign "judgment may examine into that judgment to see whether "it has been rightfully obtained or not." (*Tudor's Leading Cases on Mercantile Law, p.* 213, quoted by Mr. Norton in Section 494 of his Treatise on Evidence) cannot be applied to such a case as the present one. Under these circumstances, I am of opinion that the suit is maintainable only if the defendant is to have the liberty of pleading and proving either against the justification of the decree and its merged documents, if the decree is passed on *ex-parte* trial, and if the defendant had had no opportunity of defending it under Section 119 of the Code of Civil Procedure, or that satisfaction has been obtained of the decree now sued on, whether through the Court or not.

In regard to the second question.

If the suit is maintainable even in the Mofussil Courts under the recent rules of the High Court, the period of limitation is six years under clause 16, Section 1, Act XIV of 1859, as is already settled; but I humbly pray to be informed from what date the period is to be computed, and whether or not the time, during which the plaintiff was engaged in executing the decree, should be excluded from computation. I think the period is to be computed from the date of the decree and not from the date of the subsequent proceedings not coupled with the defendant's acts in the Execution Department amounting to an admission under Section 4, Act XIV of 1859. If there is a written admission on the record in Execution Department, whether or not it operates to reckon a fresh period from the date of such admission; and if the decree provides the instalments under Section 194 of the Code of Civil Procedure for the payment of its amount, whether the computation is to be made from the date of the decree, or from the date of the instalment, are also questions which may probably arise, if the authoritative rule for the admission of such claims be introduced, but I cannot solicit for instructions thereon, as

1869 September 6. R. C. No. 20 of 1869.

these matters have not immediately arisen in the case under reference.

I think the present case is barred by the Law of Limitation; even the period during which the plaintiff was engaged in executing the decree is excluded, under Section 14, Act XIV of 1859, from computation (as was held by the Calcutta High Court that the word "Suit" in this Section includes such proceedings in Execution Department, *Madras Jurist*, III, 268) for the decree is dated the 19th February 1863, from which the time of six years expired on the 19th February 1869; and even if the time of thirty-three days (viz. from 20th January to 21st February 1865) occupied by the plaintiff in Execution Department, is excluded from computation, the period of six years had expired on the 22nd March 1869.

The defendant may raise an objection for costs of the second suit which is brought by the plaintiff on a decree, which, if he did not neglect, might have been enforced in due time, but the judgment will, of course, depend on the discretion of this Court under Section 187 of the Code of Civil Procedure.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—As to the first question referred in this case, we are of opinion that a suit does not lie to enforce a liability specifically imposed by the decree of a Civil Court in the Mofussil, the right of suit in such a case being taken away by Section 11 of Act XXIII of 1861.

That Section provides that all questions regarding mesne profits reserved for adjustment in the execution of the decree, or mesne profits or interest payable between the date of the suit and execution of the decree, as well as questions relating to alleged payments in discharge or satisfaction of the decree or the like, "and any "other questions arising between the parties to the suit "in which the decree was passed and relating to the "execution of the decree shall be determined by order of

"the Court executing the decree and not by separate suit." The provision is an extension of the former enactment in Section 283 of Act VIII of 1859 for which it was substituted and we have no doubt that its terms were intended to have their full operation. So read, the effect of the Section, we think, is to take away from the parties to the suit the right to raise by a fresh suit any question relating to their rights and liabilities under the decree, and in accordance with the whole policy of the law of Procedure, to make every such question determinable upon a proceeding before the same Court and in the same suit. It substitutes a hearing in course of execution for a trial in a suit.

And by this restriction no reasonable advantage is lost to the parties, for an appeal from the orders made in the prescribed proceeding is given, and a simple course of procedure is provided in Act VIII of 1859, Section 284, *et seq*, by which a decree of one Court may be speedily and effectually enforced by process of execution within the jurisdiction of any other Court in the British territories in India.

As therefore the suit in which the present question has arisen was brought to compel payment of the debt specifically decreed and which but for the Act of Limitations would have been enforceable by process of execution, we think its reception by the District Munsif was clearly prohibited by the above enactment. The case reported in 4, *Madras Jurist* 127, to which the District Munsif has referred, arose in a suit upon the judgment of a Court which was not governed by the Code of Civil Procedure and is therefore not applicable to the present case.

It becomes unnecessary to say anything in regard to the second question referred.

Appellate Jurisdiction (a)

Special Appeal No. 565 *of* 1868.

VENKATACHELLA MANIYAKARER......*Special Appellant (Defendant.)*

THATHAMMAL............................*Special Respondent (Plaintiff.)*

An instrument was executed by the defendant, a Hindu, to his wife, stipulating that the defendant and his wife should continue to enjoy certain immoveable property jointly, with a right of survivorship, and containing a promise by the defendant to surrender the property to his wife if he married again.

Held, that the instrument did not operate by way of gift, there being no change in the possession of the property, nor as a declaration of trust, and that it did not create a binding obligation which the law would enforce.

Quaere—Whether the Hindu Law admits of the applicability of the principle on which Courts of Equity in England hold voluntary declarations of trust to be binding against the declarant.

1869. *September* 6. *S. A. No.* 565 *of* 1868.

THIS was a Special Appeal against the decision of J. R. Daniel, Acting Additional Principal Sadr Amin of Madura, in Regular Appeal No. 170 of 1867, confirming the decree of the Court of the District Munsif of Madura in Original Suit No. 298 of 1866.

The plaintiff sued to recover certain nunjah, punjah, and garden lands, as well as a house, and alleged that she was entitled to the same under the deed A in consequence of her husband, the defendant, having married again in violation of the terms therein mentioned.

The defendant admitted the execution of the deed A, but pleaded that it was not valid in law, and that plaintiff's claim, based as it is on the said document, was not sustainable.

The question raised was whether the agreement A was valid in law.

The agreement was termed a deed of maintenance granted by the defendant to his wife (plaintiff). The substance of it was as follows :—" I have been married to you

(a) Present : Scotland, C. J. and Innes, J.

ten years ; according to the custom of our caste both man and woman may marry as often as they like. As you intend to marry again, unless I settle my property upon you now, and I am now too old to get another wife I give you my property (as described)—we are to enjoy it together, the survivor becoming the owner. If either of us marry again, his or her claim to the property will be entirely forfeited."

The Munsif gave plaintiff a decree to the extent of the defendant's interest in the property. Upon appeal the Principal Sadr Amin confirmed the Munsif's decision for the following reasons :—

A superseded wife is entitled to compensation from her husband, and any gift which he makes on his re-marriage becomes her property. A man may make a gift of all his property binding as against himself, and had this property been given on the occasion of the second marriage there could have been no doubt as to the validity of the gift. There is no reason therefore why the agreement to make this compensation on his re-marriage should not be binding.

The defendant presented a special appeal to the High Court against the decree of the Principal Sadr Amin.

O'Sullivan, for the special appellant, (the defendant.)

The Court delivered the following

JUDGMENT :—This is a suit to recover certain immoveable property under the terms of a written instrument executed by the defendant in favor of his wife, the plaintiff. The material part of the instrument has been admitted to be in substance correctly set forth in the judgment of the Principal Sadr Amin. After stating that the plaintiff and defendant had been married ten years, and according to the custom of their caste either might marry again, it stipulates that as the plaintiff intended to marry again unless the defendant settled his property upon her then, and as he was too old to get another wife, he gave her the property described in the instrument, that they were to enjoy it together, the survivor becoming the owner, and that if either married again, his or her claim to the property would be entirely forfeited. The

1869. September 6. S. A. No. 565 of 1868.

defendant has, since the execution of the instrument married again, and the suit is founded on the breach of the stipulation. Both the Lower Courts have decreed in the plaintiff's favor to the extent of the defendant's proprietary right in the property,—the Court of First Instance assuming the binding effect of the instrument, and the Court of the Principal Sadr Amin proceeding on the ground apparently that it operated as a gift. The defendant has appealed from the decree of the latter Court, and the ground of objection relied upon is that the instrument evidences no enforceable obligation to make over the plaintiff's share of the property to the defendant.

We are of opinion that the objection is a valid one. The instrument clearly did not operate as a perfect gift, as no change in the possession and enjoyment of the property appears to have taken place under it, and the only question is, can any legal effect be given to it as conferring on the plaintiff an equitable estate or interest in the property entitling her to possession, or as a binding contract to transfer it in the event which has happened ?

Now if we could have construed the instrument to be a declaration that the defendant should, from its execution, hold the property as trustee for the plaintiff, it would have been necessary to consider whether the Hindu Law admitted of the applicability of the principle on which the Courts of Equity in England hold voluntary declarations of trust to be binding against the declarant, and, if so, we might have upheld the decree appealed from on the ground that it enforced the performance of the trust imposed on the defendant. But the instrument does not, we think, admit of such a construction. It seems to us to import no more than an agreement that the parties should continue enjoying the property jointly as man and wife (as it appears they did for some time) and that the survivor should be the owner of it, and further a promise by the defendant to surrender the property if he again married. In effect, the instrument evidences a promise on the defendant's part of the ownership of the property in the event either of his wife's surviving or his marrying again.

Then, being purely gratuitous, that promise is not a binding obligation by contract which the law will enforce, any more than if it had been merely a verbal promise. Consequently the plaintiff's claim is not sustainable even on the ground of a contract by the defendant to transfer the property. The decrees of the Lower Court must be reversed and the suit dismissed; but considering the relationship of the parties, we think no costs should be allowed.

1869.
September 6.
S.A. No. 565
of 1868.

Appellate Jurisdiction (*a.*)

Special Appeal No. 75 *of* 1869.

MUTTU VIRAN CHETTY and another.......... *Special Appellants* (*4th and 12th Defendants.*)

RANI KATTAMA NATCHIYAR and another............... *Special Respondents* (*1st and 3rd Plaintiffs.*)

A perpetual or permanent lease at a low fixed rent made by a Zemindar who obtained the zemindary by self-acquisition is binding upon the Zemindar's successors, although the instrument was not registered under Regulation XXV of 1802, Section 8.

THIS was a Special Appeal against the decision of J. D. Goldingham, the Acting Civil Judge of Madura, in Regular Appeal No. 228 of 1868, reversing the decree of the Court of the Principal Sadr Amin of Madura in Original Suit No. 118 of 1866.

1869.
September 7.
S. A. No. 75
of 1869.

This suit was brought by the plaintiffs, of whom the 1st is the zemindarni, and the 2nd the lessee of the Shevagunga estate, to recover the melvarum right of the village of Kuttagudy situated in the said zemindari valued at rupees 3,330, as also rupees 6,098, being the value of the melvarum or Zemindar's share of the produce, &c., derived from the village in Fuslies 1273 and 1274. The plaintiffs represented that the village in question is a part of the zemindary, having been included in it at the period of the permanent settlement; that the melvarum right thereof was enjoyed by the Istimrar Zemindar till his death in 1829 when the estate having passed into the hands

(*a*) Present: Innes, and Collett, J. J.

of the usurpers, the 1st defendant obtained a grant of the melvarum right of the said village subject to the payment of a light or favorable quit-rent; that this alienation of a portion of the zemindari being illegal, the plaintiffs attempted to resume the grant immediately after the right of the 1st plaintiff to succeed to the zemindari was recognized by the decree of the Privy Council, and instituted suits before the Collector of the district for compelling the tenants of the said village to exchange puttahs and muchilkas; that as these suits were finally rejected by the High Court on the ground of the grant in question having been made by the Istimrar Zemindar, the present action has been filed to set it aside.

No written statement was filed by any of the defendants, but counsel appeared on behalf of the 4th and 12th defendants, and pleaded that the suit was barred by the Statute of Limitation, inasmuch as the village in dispute was granted to the defendants in 1828 by the Istimrar Zemindar and had remained in their uninterrupted possession for upwards of 30 years. He admitted that the village was an Ain one at the date of the grant.

This objection was overruled at the first hearing of the case, as in the first place, it was denied by the plaintiffs that the grant was made by the Istimrar Zemindar, and in the second, she and her mother were engaged in a protracted litigation regarding the said zemindari from 1833, which terminated only in 1863, and therefore not in a position to sue earlier for the cancelment of the grant in question.

The following issues were settled :—

I. Whether or not the grant relied on by the defendants 4 and 12 was issued by the Istimrar Zemindar.

II. Whether or not the grant is legal and valid, and binding on the 1st and 2nd plaintiffs, and

III. Whether or not the plaintiffs are entitled to the damages sought for.

The Principal Sadr Amin found the first issue in favor of the defendants.

1869. September 7. S. A. No. 75 of 1869.

His judgment upon the second issue was as follows :—

The act of the Istimrar Zemindar in alienating melvarum right of Kuttagudy which was included in the assets of the zemindari when the permanent settlement was made is neither legal nor valid. The grant was not made in conformity with the requirements of Regulation XXV of 1802. It was not registered in the Collector's Office as required by Regulation XXV of 1802, nor was the village sub-assessed and a proportionate reduction made in the peishcush of the zemindari. As ruled by the High Court in Regular Appeal No. 38 of 1865, *page* 68, *Vol.* 3, *High Court Reports*, " the grantee might have been ejected the next morning after the grant was made." But the defendants contend that the title to resume the grant having accrued to the Istimrar Zemindar, the 1st plaintiff's father, the plaintiffs ought to have called in question the validity of the grant within twelve years after the title to resume accrued, and that they are not now competent to dispute the defendant's right to enjoy the melvarum of the said village. In reply, the plaintiffs represent that the 1st plaintiff and her mother were engaged in establishing their right of succession to the whole estate of Shevagunga from the date of the Istimrar Zemindar's death till 1863, and that the time during which they were so engaged should be excluded in computing the period of limitation. I was at first disposed to recognize their right to make the deduction, since neither the 1st plaintiff nor her mother was in a position to sue for portions of the zemindari when her right to the whole estate was under litigation, but the counsel for the defendants objects to any deduction being made on the said account since the present defendants were not parties to the former suit, and the circumstance of the 1st plaintiff's and her mother's right of succession being under litigation did not hinder them from suing to set aside improper alienations made by the Istimrar Zemindar.

A case analogous to the present one was disposed of by the High Court of Calcutta, and is quoted at page 190 of " Act XIV of 1859" by Mr. N. H. Thomson. It is that of *Mudden Mohan Tavari* v. *Kishen Mohan Koondoo*, in

1869. September 7. S. A. No. 75 of 1869.

which the plaintiff, an adopted son, sued to set aside certain acts of his adopting mother in alienation of the estate of his adopting father. The defendants in possession of the estate pleaded limitation by reason that the plaintiff's suit was not brought within twelve years from the date of the acts which he sought to set aside. In reply, the plaintiff contended that, in computing the period of limitation, a deduction should be made of the time during which he was engaged in prosecuting, as against those who, on failure of his right, would have been heirs of his adopting father, successive suits to establish the legality of his adoption. The Lower Court decided that, as the plaintiff was in no position to sue until his right to the succession had been determined, the time during which the former litigation had been pending should be deducted. But this decision was reversed on appeal by the High Court, who observed that the deduction contemplated in Section 14, Act XIV of 1859, is of the pendency of suits of an entirely different character as therein specified, and that the circumstance of the plaintiff's right of succession being under litigation in no way interfered with his right of suit to set aside alienations, since, when he sued his mother to establish the legality of his adoption, he might at the same time have sued to have her acts set aside. The omission of the 1st plaintiff to sue within twelve years from the date of the grant to have it set aside is therefore fatal to her present claim, and her right to resume the grant in question is barred by lapse of time. She is consequently bound to continue it.

For these reasons I reject the plaintiff's claim and charge each party with their own costs.

The plaintiffs appealed, and the Civil Judge, holding that the suit was not barred, reversed the decree of the Principal Sadr Amin. The following is taken from the judgment:—

From the numerous cases that have been referred to and consulted upon the operation of the Law of Limitation, I gather that if the 1st plaintiff had inherited through the immediate successors of the Istimrar Zemindar, she

1869. September 7. S. A. No. 75 of 1869.

would have been bound by their laches, but that as the title to the zemindary was involved in litigation during nearly this whole period which intervened, and as the property was never finally adjudged to her till 1863, nor possession made over till 1864, the cause of action as between the present parties did not arise till that latter period.

The case which bears the closest resemblance to the present is to be found in the judgment of the High Court in Regular Appeals Nos. 21 and 30 of 1866, but there is this difference that there the lands in contention though granted by the Istimrar Zemindar were resumed by him at the death of the grantee and subsequent possession was obtained by his widows by an act of the usurping Zemindar. The Principal Sadr Amin in throwing out this case has relied solely upon a judgment of the High Court of Calcutta quoted at page 190 of *Thomson's Commentary on the Limitation Act.* How far this case is analogous to the present one is difficult on the mere report to say, but it does not seem to me to be strictly parallel. In the Bengal case the adoptive mother of the plaintiff had alienated a portion of her husband's estate, and plaintiff had sued to have the legality of his adoption established. The defence was that plaintiff's suit to set aside the alienation was neither brought within twelve years from the date of the acts complained of nor within three years of attaining his majority, and the Court held that the circumstance of plaintiff's right of succession being under litigation in no way interfered with his right of suit to set aside the alienations. There appears therefore this difference between the two cases, that in Bengal plaintiff was suing for succession to property a portion of which had been alienated, a circumstance which is presumed he was acquainted with. Here 1st plaintiff was suing for recovery of a large landed estate in possession of an usurping branch of the family, there had been no real alienation of landed property, but the melvarum of a village had been given away upon such favorable terms as almost to constitute it a present, and clearly 1st plaintiff could have had no knowledge of the circumstance till she had actually taken possession.

1869. September 7. S. A. No 75 of 1869.

of the zemindary. The reasoning adopted by the Bengal High Court if applicable here would appear to me to be equally applicable to the case decided by the Madras High Court, but the judgment of that Court is concluded with the following observation.—" It must be considered that the defendants have always held their lands subject to the final determination of the pending litigation, and that no separate and independent cause of action for possession had risen as against them before 1863."

In this case it is difficult to say how 1st plaintiff could have sued for the full melvarum of this village while her title to the zemindary was in dispute, and while the management of it was in other's hands. It appears to me she would have been met at the outset with this objection—" You have no right to the revenue of the estate at all—what have you to do. with the details of the collections—first make out your title to the whole and then come in for the less." Besides this it appears the rightful owners of the zemindary were kept out during this long period not from neglect on their part to put forward their claims but from what their Lordships in the Privy Council call a signal failure in the Courts below to do justice between the parties. Then again had the zemindary escheated to Government, would they have been bound by this alienation when the regulation forbidding such alienations was passed for the express protection of the public revenues? Taking this view of the case, I differ from the Principal Sadr Amin in holding that the suit is barred, and for the reasons stated reverse the decree of the Lower Court, judgment being for plaintiffs for the melvarum of the village and the loss of produce claimed together with costs of suit throughout and interest thereon at six per cent. per annum till date of collection.

The 4th and 12th defendants presented a special appeal to the High Court against the decree of the Civil Court for the following reasons, namely.

Error in law in that,—

The plaintiff's suit is barred by the Act of Limitation.

1869. September 7. S. A. No. 75 of 1869.

The deed of grant, defendant's exhibit I, is valid and effectual in law and binding on the plaintiffs.

Under any circumstances the plaintiffs have no right to the melvarum for two years claimed by the plaint.

Handley and *Scharlieb*, for the special appellant, (the 4th and 12th defendants.)

Advocate General, for the 1st special respondent, (the 1st plaintiff.)

The Court delivered the following

JUDGMENT:—In this special appeal we must take the facts to be as found by the Lower Courts that the village in question, or speaking accurately the melvarum right over it, was granted in 1828 by the rightful Istimrar Zemindar to the special appellants, and that the deed of grant was not registered in accordance with Section 8, Regulation XXV of 1802. It was conceded bythe counsel for the special appellants that if no right of action to set aside such grant arose till after the death in 1829 of the Istimrar Zemindar, then the decision of the Lower Appellate Court, that the present suit by the 1st plaintiff who recovered possession of the zemindary only in 1863, is not barred by the Law of Limitations, must be sustained. But the main contention for the special appellants was that the grant of 1828 was a grant of a permanent lease, and the recent decision of this Court in Special Appeal No. 129 of 1869 (*a*) (not yet reported) which followed the decision of the Privy Council reported in 8 *Moore's Indian Appeal Cases* 327 and overruled the previous decision of this Court reported in 1 *Madras High Court Reports*, 143, was relied upon as fatal to the plaintiff's case. We have first therefore to consider what was the nature of the grant made by the instrument of 1828, and we are of opinion that it ought to be regarded as a permanent or perpetual lease at a low fixed rent. It is true that the instrument is entitled " a deed of gift of land, " and it begins with the words " I have given you in gift the village of Kuttagudy, &c.," but it then proceeds to set

(*a*) Ante Page.

1869. September 7. S. A. No. 75 of 1869.

out the quantity of land conveyed, and states that after deducting the land set apart for a temple, there are 171 kallams and two merkals of nunjah land and 25 kurukkams of punjah land ; and concludes with these words " you will have to pay a rent at seven fanams for each kallam of nunjah land and one fanam for each kurukam of punjah land." Now it is quite clear that in this country little or no stress can be laid on whether the word used in such an instrument as this is " given" " granted" or " demised"—the whole document must be looked at, and the real nature of the interest created by it must thus be ascertained. Here the substance of the document is that there is a conveyance in perpetuity of a certain quantity of land with the reservation of a rent fixed at so much for each measure of land. This is really a fixed rent, though no doubt at a favorable rate and is not a mere pepper-corn rent, if that would make any difference, though we are not at present prepared to say that it would. We therefore are decidedly of opinion that the interest created by this instrument was a perpetual lease at a low fixed rent. If so that brings the case within the rule laid down by the Privy Council in 8 *Moore's Indian Appeal Cases* 327, in deference to which a recent decision of this Court overruled the previous decision of this Court reported in *Mad. H. C.* 143. For the plaintiffs we were referred to an unreported decision of this Court in Regular Appeal No. 30 of 1864 where the case in 8 *Moore* was cited but distinguished. Besides that we are bound to follow the decision in the Privy Council in preference to any decision by this Court, we are of opinion that on examination of the facts of the case in 8 *Moore* the grounds relied on in Regular Appeal No. 30 of 1864 for distinguishing the case are not sustainable, and it is essential for us to consider them, for if sound they would render this case also distinguishable. It was said by this Court in Regular Appeal No. 30 of 1864 that in the case in 8 *Moore* the original grant was of a date long anterior to the permanent settlement and that the Zemindar therefore took his estate then subject to that deduction from his revenues, and that consequently there was nothing

1869. September 7. S. A. No. 75 of 1869.

in the Judgment of the Privy Council at variance with the old decisions of the late Sadr Court which were accordingly followed. It is clear from the Judgment in 8 *Moore* that the facts of that case were quite mistaken by this Court. There had indeed been grants by the ancestors of the Zemindar to the ancestors of the plaintiff in that case anterior to the permanent settlement, but the sole foundation of the plaintiff's title was a deed of 1805 subsequent to the settlement, and so far from any deduction or allowance having been made to the Zemindar at the time of the settlement for the villages held by the plaintiff's family, the grant of the whole zemindary including the villages was made without noticing the rights of the plaintiff's family, and the sole object of the deed of 1805 was to secure such rights without disturbing the grant of the zemindary, and this was done by fixing in the form of a rent upon the villages held by the plaintiff's family a sum of money which was in fact the proportion of the *jumma* which was assessed upon them by the Government at the permanent settlement, the deed of 1805 being in form a demise in perpetuity of the villages with this sum reserved as annual rent. Indeed the Lower Courts thought so little of the grants anterior to the permanent settlement, that they did not consider the question of their genuineness, but the Privy Council regarded the grants as of some value as a matter of inducement showing the probabilities of the case. The case was, therefore, the case of the creation of a perpetual lease at a low fixed rent subsequently to the permanent settlement, though the inducement thereto was the existence of a rent-free estate anterior to it.

It was further contended for the plaintiffs in the present case that even if the deed of 1828 is to be regarded as creating a perpetual lease, yet that the rule of the general Hindu Law against alienation of family property applied, and that it mattered not that the form of the thing was a perpetual lease at a low fixed rent if the substance of it was permanently to diminish and alienate the interest of the heirs in the property. Had this been the case of a descended zemindary, and therefore to be regarded as ancestral property, we should probably have thought the

1869. September 7. S. A. No. 75 of 1869.

argument a very sound one ; but it is an undisputed fact, and indeed was the ground of title on which the 1st plaintiff ultimately succeeded in 1863 in ejecting the usurpers who had been in possession since 1829, that this zemindary was the self-acquired property of the Istimrar Zemindar who executed the deed of 1828, and there can therefore be no question as to his right, according to the general Hindu Law, to make the alienation, at least in the absence of any male issue. Upon the whole we are of opinion that the contention for the special appellants is well founded, and that we are bound to hold in accordance with the Judgment of the Privy Council in 8 *Moore* that the deed of 1828 is not invalid for want of registration and is binding upon the plaintiffs. The result is that we shall reverse the decree of the Lower Appellate Court and dismiss the plaintiff's suit, and we think that no sufficient reason appears why the 4th and 12th defendants, the special appellants, should not have their costs as well in both the Lower Courts as also of this special appeal, and it will be decreed accordingly.

Appellate Jurisdiction (a.)

Special Appeal No. 541 *of* 1868.

NETIETOM PERENGARYPROM *alias* PANISHERRY DAMODREN NAMBUDRY. } *Special Appellant (Plaintiff.)*

TAVANBARRY PARAMESHWAREN NAMBUDRY. } *Special Respondent (Defendant's heir.)*

The plaintiff brought a suit to establish his right to certain property as against the claim which the defendant had successfully made under Section 246 of the Civil Procedure Code in execution of a decree obtained against the plaintiff. The order of the Court directed the release of the property from attachment. The present suit was brought more than one year from the date of the order.

Held, per Scotland, C. J, Bittleston, and Collett J, (Innes J. doubting) that the plaintiff was a party against whom the order was "given," within the meaning of the Section, and that the suit was barred by the Section.

1869. October 12. S. A. No 541 of 1868.

THIS was a Special Appeal against the decision of I. K. Ramen Nair, the Principal Sadr Amin of Calicut, in

(*a*) Present : Bittleston, Innes, and Collett, J. J.

Regular Appeal No. 314 of 1867, confirming the decree of the Court of the District Munsif of Nedunganad in Original Suit No. 649 of 1864.

1869. October 12. S. A. No. 541 of 1868.

The plaint set forth that, when the 17 pieces of land were attached in execution of the decree of the late Mufti Sadr Amin of Calicut in Suit No. 11 of 1862 passed against the plaintiff, the defendant presented a petition of claim No. 48 of 1863 to the Court of the Principal Sadr Amin of Calicut, stating that he (defendant) was in possession of the said pieces of land and the remaining pieces of land mentioned in the schedule under a jenmam deed of sale of such property obtained in 1838, and the Court thereupon investigated the claim and decided on the 17th September 1863 that the lands should remain in *statu quo*, and that the party feeling aggrieved might seek redress by a regular suit. He therefore brought this suit, valued at rupees 403-5-3, for setting aside the pretensions of the defendant as to jenm right.

The following is taken from the Munsif's judgment:—

The plaintiff, his vakil, and Krishnen, the writer of the plaint and vakalutnamah, were examined.

It appears that the cause of this action is the order dated 17th September 1863 on a petition of claim No. 84 of 1863 presented by the defendant when the property was placed under attachment in execution of the decree of the Mufti Sadr Amin of Calicut in Suit No. 11 of 1862.

Section 246 of the Civil Procedure lays down that a regular suit against an order on a claim presented on property attached in execution of a decree, must be instituted within one year from the date of such order, but his suit was only instituted a year and four day after the said order, namely on the 21st September 1864.

Upon Appeal, the Principal Sadr Amin confirmed the decree of the District Munsif for the follows reasons:—

The main question to be decided in this case is whether the limitation prescribed in Section 246 of Act VIII of 1859 is or is not applicable to this case.

1869. October 12. S. A. No. 541 of 1868.

The appellant's vakil argues that it does not apply, because the plaintiff has not brought his suit to get the property sold for the judgment debt in question. The Section under consideration does not, in my opinion, make any such distinctions, as it only enacts that "the party against whom the order has been given may bring a suit to establish his right within one year." The procedure prescribed by the Section also appears to have been adopted in the case before us, and as the plaintiff has entirely based his suit upon an order passed under that Section, his suit should have been brought within the period prescribed in the Section.

Plaintiff presented a special appeal to the High Court on the grounds that,—

The suit was not barred by the 246th Section of the Civil Code of Procedure.

The order on the petition, dated 17th September 1863, did not define the rights of the debtor and the intervenor

Gover, for the special appellant, (the plaintiff).

Snell, for the special respondent, (the defendant's heir.)

The following are the opinions recorded :—

SCOTLAND, C. J.—This is a suit to establish the plaintiff's right to the property mentioned in the plaint, as against the claim which the defendant had successfully made under Section 246 of the Code of Civil Procedure after the property had been attached in execution of a decree obtained against the plaintiff in the Court of the Mufti Sadr Amin of Calicut. The order of the Court in favor of the claim and for releasing the property from the attachment was passed on the 17th September 1863, and this suit was instituted on the 21st September 1864. Both the Lower Courts have decreed the dismissal of the suit on the ground that as the interval between those dates was more than a year, the suit was barred by the provision in Section 246; "the order which "may be passed by the Court under this Section shall not "be subject to appeal, but the party against whom the order "may be given shall be at liberty to bring a suit to estab-

" lish his right at any time within one year from the date " of the order." 1869. October 12. S. A. No. 541 of 1868.

The ground of objection now relied upon on the part of the plaintiff is that the investigation under the Section was between the judgment-creditor and the claimant (th present defendant.) and that the former and not the plaintiff (the judgment-debtor) was the party against whom the order was given within the meaning of the Section, and consequently that the limitation of one year did not apply to the plaintiff's right to sue.

I am of opinion that this objection is not tenable, and that the decision of the Lower Courts is right. The order in favor of the claim was undoubtedly against the interests of the plaintiff, for it was a decision against the very right which he has brought this suit to establish; and I think that, as the original defendant and judgment-debtor in the suit, he became a party to the investigation of the claim under the Section. The effect of the Section is to make the investigation of a claim to attached property a further summary proceeding between the parties to the suit who are interested in the property which is the subject of the claim. It provides that the Court is to proceed just as if the claimant had been originally made a defendant to the suit, and also for the summoning of the original defendant as a party to the investigation in the same manner as he might have been summoned before the decree, and all the questions which are made determinable by the Court on the investigation relate to the right of the judgment-debtor in the attached property. The plaintiff therefore was as much a party against whom the order was made under the Section as the judgment-creditor and the words "the party" have a plural as well as singular signification. Consequently, the suit has been rightly held to be barred, and the decree appealed from should be affirmed with costs.

INNES J.—In this Special Appeal the sole question is whether plaintiff is within time in bringing his suit.

In Suit No. 11 of 1862 he was defendant, and a decree was passed against him in enforcement of which certain lands

1869. October 12. S. A. No. 541 of 1868.

were attached as his by the decree-holder. A claim against them was then preferred by the present defendant, and the Court which investigated the claim should have passed an order either allowing or disallowing the claim. The order actually passed was that the property should remain as it was, that is, should continue under attachment without any steps being taken to carry further the enforcement of the decree, and that the aggrieved party should seek redress by a regular suit. This order, no doubt, affected prejudicially the interests of the *decree-holder*, as he was thereby deprived for an indefinite period of the benefit of his attachment. The order therefore was in some sense an order passed against him, but not I think in the sense intended in the Section. Further, the property had been under attachment, and would have been sold in satisfaction of the decree, and in so far as by this order it was rendered for the present unavailable to satisfy the debt due by this plaintiff the order may also be said to have been passed against him. But to determine whether the order in this proceeding was in the sense intended in the Section passed against any one of the parties to it, it is necessary to see what was the issue between the parties to that proceeding. It was simply whether the claimant had a right to the property attached, and if the order passed can be said to be an order at all under the Section, the effect of it in that proceeding was to disallow the claim and therefore to decide this issue against the claimant. The claimant therefore was the person againt whom and against whom alone in my opinion the order was passed in the sense intended in the Section, and I think that the plaintiff's claim is not barred. I would reverse the decrees below and direct that the suit be disposed of on the merits.

In consequence of this difference of opinion, the order passed under Section 246 was called for and returned and thereupon the following modified opinion was recorded by

INNES J.—It now appears that the order of the Principal Sadr Amin was not that the property should remain in *statu quo* as translated in the printed paper, but that it should revert to its original condition; that is, that the attachment should be considered at an end.

This being so, was there any order within the meaning of the Section passed against this plaintiff? He was the owner of the property and it was attached as his. The question at issue in the proceeding before the Principal Sadr Amin was whether the claimant had a right to the property attached.

I am of opinion that the order passed was no order at all within the meaning of the Section, and that whether it was so or not, it was not an order passed against the plaintiff, because the issue certainly did not allow (though it did not distinctly disallow) the right of the claimant. I am therefore of opinion that the claim of plaintiff in this suit is not barred by reason of his not having brought the suit within one year from date of the order.

The following are the judgments of the full Court:—

BITTLESTON, J.—In consequence of a difference of opinion between the Chief Justice and Mr. Justice Innes, this case was re-argued before myself, Mr. Justice Innes, and Mr. Justice Collett, and, after carefully considering the arguments addressed to us, I am of opinion that the present plaintiff was a party against whom the order of the Principal Sadr Amin was given in the former suit under Section 246 of Act VIII of 1859, and that therefore after the period of one year he was prevented from bringing a suit to establish his right. The reasons for this decision are fully expressed in the judgment written by the Chief Justice, in which I concur.

COLLETT, J. concurred.

INNES, J.—It seemed to me before hearing the argument in appeal to the full Court that the determination of the right in the attached property of the judgment-debtor and the claimant who in this proceeding occupy the position of 1st and 2nd defendants respectively was merely incidental to the substantial object of the proceeding, the determination of the question of whether the execution should proceed or the claim be allowed. In this view I looked upon the result arrived at as an order in favor of the claimant and against the judgment-creditor only.

1869. October 12. S. A. No. 541 of 1868.

I do not, after hearing the argument, feel sufficient confidence in my opinion to dissent from the view taken by the Courts below and by my colleagues in full bench.

Appellate Jurisdiction (a.)

Special Appeal No. 61 of 1869.

ACHUMANDE AGATH KUNHI PATHUMAH and another.. } *Special Appellants (1st and 2nd Defendants.*

MAKACHINDE AGATH MAKACHI and another.................. } *Special Respondents (Plaintiffs.)*

The plaintiffs were in possession of certain immoveable property, when the Joint Magistrate, under Section 319 of the Criminal Procedure Code, placed the 1st defendant in possession until the rights of the parties should be determined by a competent Civil Court.

Held, in a suit to recover possession of the property instituted more than six months after the plaintiffs were dispossessed, that the plaintiffs could not recover without showing title.

1869. October 20. S. A. No. 61 of 1869

THIS was a Special Appeal against the decision of K. R. Krishna Menon, the Principal Sadr Amin of Tellicherry, in Regular Appeal No. 230 of 1868, reversing the decree of the Court of the District Munsif of Kaway in Original Suit No. 85 of 1866.

The plaint stated that the property sought to be recovered was the ancient jenmon of the 1st plaintiff, and that upon a Police complaint the 2nd defendant having raised a jenmom dispute, the property was deposited with the 1st defendant. The 1st and 2nd defendants had no claim whatever to this land,—therefore it was prayed that the property be recovered to the plaintiff with rupees 320-15-10, the value of produce.

The issue was whether or not the disputed land was in the possession of the plaintiff and the 1st and 2nd defendants until ousted by the Magisterial decision.

The Munsif found that the title set up by the plaintiffs had not been established and dismissed the suit upon that ground.

(a) Present: Scotland, C. J. and Collett, J.

1869. October 12. S. A. No. 61 of 1869.

Upon appeal, the Principal Sadr Amin reversed the decree of the District Munsif. The Judgment of the Principal Sadr Amin was as follows :—

It appears to me that the Munsif has misapprehended the nature of this suit. He has apparently regarded it as a suit brought for the determination of the jenm title to the lands, but in reality it did not pray for anything of the kind. The only relief plaintiff sought was the restoration to him of the possession of certain lands which while in his actual possession the Joint Magistrate of Malabar attached and made over to the charge of 1st defendant. His right to be restored to possession was alleged to rest not upon his jenm title but upon the fact of his karnavan and after him himself having been in possession up to the date of the above decision. His right to the jenm of the lands was mentioned only in the way of explanation as to how his family came to possess the lands, but the action was founded solely upon his right of possession. Was the plaintiff in possession and turned out of it or was Kalandan (his elder brother) in possesion until his death, and was his awful successor (plaintiff) prevented from succeeding to that possession by the above decision, was therefore the sole question in this case. If either of those propositions be proved, plaintiff is entitled to have his possession restored. If he held manual possession his ejectment was a mere trespass, the Magistrate having no authority to do so. In the other case also the possession of the deceased Kalandan must be held to have passed to his lawful successor and to have been resident in him at the arising of the complaint before the Sub-Magistrate of Cherikul. As far as the Joint Magistrate's decision goes to show, there was nothing from which a breach of the peace could be apprehended. Further the short interval between Kalandan's death and the lodging of the above complaint did not amount to that reasonable period, which, according to the nature of the property, would be deemed sufficient to rebut the natural presumption that property found in one's possession at his death is in the possession of his lawful successor. Proof of Kalandan's possession at his death will therefore equally entitle plaintiff

1869. October 20. S. A. No. 61 of 1869.

to recover in this case, and the evidence satisfies me that the land and paramba were in Kalandan's actual possession at his death in Minom 1040 (March, April 1864.) The witnesses speaking to this point are supported by the fact of the assessment standing in his name, and the decision of the Joint Magistrate (exhibit F) which vested the 1st defendant with possession itself almost admits the fact. The 1st and 2nd defendants, the widow and son of the deceased Kalandan, assert that his father-in-law purchased the property from his (Kalandan's) family in 1014 (1838-9) and re-sold it to his purchaser's daughter (1st defendant) in 1029 (1853-4) and while the plaintiffs contend that the alienation of 1014 (1838-9) was a fictitious transaction to defraud Kalandan's creditors and that the property never passed under it to the so-called purchaser. This question may at the proper time and place be a very fit question for the Court to try. *Prima facie*, however, the possession of Kalandan was legal, and the defendants were only entitled to dispute it in the position of plaintiffs in a competent Court. Instead of that they by an unauthorized proceeding succeeded in divesting this possession *prima facie* legal and thereby obtained the great advantage of appearing as defendants. It is unfair to plaintiffs to be compelled to meet their opponents in a disadvantageous ground while they are entitled to retain an advantageous position especially when as in this case, the evidence upon the question of jenm title is conflicting and is weighing almost equally. Without prejudice therefore to any right which the defendants may possess to the jenm of the property sued for, I reverse the Munsif's decree and order the restoration of the land and paramba to 2nd plaintiff with rent at the plaint rate payable by 1st defendant and saddle the 1st and 2nd defendants with plaintiff's costs original and appeal.

The defendants presented a special appeal against the decree of the Principal Sadr Amin.

Miller, for the special appellants, (the 1st and 2nd defendants.)

Mayne, for the special respondents, (the plaintiffs.) 1869. *October* 201 *S. A. No* 61 *of* 1869.

The Court delivered the following

JUDGMENT :—Assuming the facts to be as found by the Lower Appellate Court, viz, that the plaintiffs were in possession of the immoveable property when the Joint Magistrate by an order, under Section 319, Criminal Procedure Code, attached the property and placed it in possession of 1st defendant as receiver or custodian of the property until the rights of the parties should be determined by a competent Civil Court, the question is whether the plaintiffs can now recover possession without showing title. It is admitted that more than six months had elapsed since the plaintiffs were turned out of possession before the suit was brought, and consequently, if the Magistrate acted without jurisdiction, and the plaintiffs were turned out of possession "otherwise than in due course of law," then Section 15 of the Limitation Act is a bar to the present suit. The Principal Sadr Amin seems to consider that if plaintiffs had actual possession at the time their ejectment by the Magistrate was a mere trespass. But if the Magistrate had jurisdiction to enquire into the matter and to make an order under Chapter 22 of the Criminal Procedure Code, it was not a trespass, for the mere fact that the Magistrate took a wrong view of the evidence, upon which he was bound to decide, cannot render his order one made without jurisdiction any more than the judgment of an otherwise competent Court can be said, because founded upon a misappreciation of the evidence in the case, to be made without jurisdiction. Then if the Magistrate had jurisdiction in the case, and his order remained, as it did, in force at the institution of the suit, can the plaintiffs be entitled to treat as a mere wrong-doer and trespasser the person placed in possession under the order of the Magistrate ? It seems to us impossible to suggest any ground for such a view. The order was one made in due course of law and not reversible in the suit, and the possession acquired under it was a lawful one, though it is of course liable to be determined by the decision of a competent Civil Court in accordance with

1869. October 20. S. A. No. 61 of 1869.

the civil rights of the parties which it was not within the competency of the Magistrate to consider, and which he did not pretend to consider or decide. In this view the plaintiffs in the present suit cannot succeed without proving title in themselves. The Principal Sadr Amin disposed of the case on the ground that the present suit is not founded upon title but is brought to enforce a bare right to immediate posession as against the 1st defendant whom the plaintiffs claim to treat as a mere wrong-doer and trespasser. We agree that strictly construed this was the object of the suit, but the plaint fairly admits of the question of title being tried in the suit, and the Court of First Instance decided the suit upon this question. For these reasons the decree of the Lower Appellate Court must be reversed, and we think that the plaintiffs are entitled to have the case remanded in order that the Lower Appellate Court may consider and decide the question of title in the appeal. The plaintiffs must pay the defendant's costs of the special appeal, and the costs hitherto in both the Lower Courts will abide the final decree in the appeal.

Appellate Side.

Proceedings, 10*th January* 1868.

UPON the question from the Acting Civil Judge of Chittur, "whether a Deputy Collector in independent charge of a Division of a District can refer cases under Regulation 12 of 1816 for disposal to a District Munsif," 1868. *January* 10.

The Court passed the following

A Deputy Collector, invested by a Collector with all the powers of a Covenanted Assistant or with the special power to determine claims under Regulation XII of 1816, is competent to refer cases under that Regulation for disposal to a District Munsif.

The authority must be delegated under Section 3, Act VII of 1857.

RULING :—The circumstances out of which this reference has arisen are as follows: Mr. Hewetson, the Deputy Collector in charge of the Zemindari Tracts and Chandragherry Taluk of the District of North Arcot, had occasion, at the request of certain parties, to refer a dispute to a District Punchayat under Clause 7, Regulation 12 of 1816, and accordingly addressed the District Munsif of Tripaty on the subject. The Munsif declined to recognise the authority of the Deputy Collector, intimating that such a reference could proceed only from the Collector of the District.

The High Court are of opinion that if Mr. Hewetson has been formally invested by the Collector with all the powers of a Covenanted Assistant Collector, or with the special power to determine claims under Regulation XII of 1816, he was competent to make the reference.

The mere fact that Mr. Hewetson has been placed in independent charge of a Division of a District does not itself convey the requisite authority which must be delegated under Section 3, Act VII of 1857.

Appellate Side.

Proceedings, 17*th January* 1868.

UPON a question from the Acting Session Judge of Chittur on the legality of suspending sentences of criminals pending an appeal to the High Court, 1868. *January* 17.

The Court passed the following

1868. *January* 17.

RULING :—A Session Judge has no authority to suspend his own sentence. The period during which the sentence is suspended by order of the Appellate Court can alone be considered as a period during which the punishment has not been proceeding.

A Session Judge has no authority to suspend his own sentence.

Appellate Side.

Proceedings, 14*th February* 1868.

1868. *February* 14.

UPON a question referred the High Court passed the following

RULING :—In this case the second prisoner was convicted and sentenced to one year's rigorous imprisonment on a charge of house-breaking by night with intent to commit theft.

The only evidence against him was his own admission of guilt deposed to by the fifth and sixth witnesses for the prosecution—two inhabitants of his village—of whom the former was the head of the village.

The head of a village is within the definition of a Magistrate as defined in Section 15 of the Criminal Procedure Code.

The Magistrate, on a perusal of the evidence, was of opinion that at the time when these admissions were made, the prisoner was in custody of the Police, and that the evidence was inadmissible, not being made in the immediate presence of a Magistrate.

The High Court are not clear that the prisoner was in the custody of the Police at the time of making the alleged confession. The expressions of some of the witnesses seem to show that he was undergoing an examination preliminary to arrest. However this may have been, the High Court are of opinion that the head of a village is within the definition of a Magistrate as defined in Section 15 of the Code of the Criminal Procedure, and that the confession was therefore made in the immediate presence of a Magistrate. Had he been a Police Officer as well as a Magistrate, the admissibility of the confession would have been matter for serious doubt, but Act XVII of 1862 expressly repealed those Sections of the old Regulations which invested heads of villages with Police functions.

In dealing with confessions of this nature, the utmost caution should of course be used and the degree of credit to be attached to them most carefully considered.

Appellate Side.

Proceedings, 18th February 1868.

UPON receipt of the record of certain proceedings of the Acting Head Assistant Magistrate of Tinnevelly, 1868. *February* 18.

The High Court passed the following

The rejection of an application for maintenance made by the wife of a Christian who had reverted to Hinduism and married a second wife is not warranted by the decision reported in III, M. H. C. Reps. VII.

RULING :—The Acting Head Assistant Magistrate rejected an application for maintenance made by the wife of a Christian who had reverted to Hinduism and married a second wife.

His reason was that he conceived the decision of the High Court, Vol III, Appendix 7 (1) to determine that a relapse into Hinduism dissolved a previous Christian marriage. That decision was merely that a Hindu marriage of a man reverting from Christianity to Hinduism was not void in consequence of a previous Christian marriage. The decision of the High Court did not touch the point which the Assistant Magistrate supposes it to have determined.

The ground of the Assistant Magistrate's decision being therefore manifestly untenable, it is reversed and the case remitted for decision upon its merits.

Appellate Side.

Proceedings, 3rd March 1868.

UPON a question regarding the powers of District Munsifs to allow a settlement of suits by oath 1868. *March* 3.

The High Court passed the following,

The Courts no longer possess the power of settling cases by "oath."

RULING :—The questions mooted are referred by the Civil Judge in the following words :

"Read Section 27 of Regulation VI of 1816, and Circular "Order thereon of Sadr Adálat, 20th August 1835, authorising "District Munsifs to let causes be settled by 'oath.'

"Read Act X of 1861 repealing Section 27 of Regulation VI "of 1816. Have the District Munsifs still power to admit of "settlement by oath?"

1868. *March 8.* " Read Section 6, Regulation III of 1802, giving the same " power to the Zillah Courts, and Act X of 1861 wherein so much " of Section 6, Regulation III of 1802 as relates to the administra- " tion of ' oaths' to parties is stated not to be repealed. Thus " the Zillah Courts have power to admit of settlement by ' oath.' " Can therefore the District Munsifs permit suits in their Courts " to be settled by ' oath' administered to the parties through the " instrumentality of the Zillah Court ?"

In the second question the Civil Judge is in error in supposing that Section 6, Regulation III of 1802 is unrepealed. The reservation clause in Act X of 1861 refers to Section 7, Regulation III of 1802, only, and merely reserves to Zillah Courts the power of examining witnesses and parties on oath or solemn affirmation. The same power, conferred by Section 31, Regulation VI of 1816 on District Munsifs, is also reserved.

The Sections relating to the settlement of suits by oath when the parties mutually consent to that mode of settlement being repealed, the Courts no longer possess the power of following that procedure. But there is nothing to prevent the Courts, if they have the means, from facilating a settlement of this nature by the parties, by satisfying themselves that the necessary conditions are fulfilled.

Appellate Side.

Proceedings, 16th March 1868.

1868. *March 16.* UPON a question referred by the Session Judge of Salem The Court passed the following

Recruiters of Emigrants charged under Section 71, Act XIII of 1864, must be tried by the Magistrate within whose jurisdiction the holding out of false pretences to the labourers took place.

RULING :—In this case the Magistrate convicted two persons, recruiters of Emigrants, under Section 71, Act XIII of 1864 for failing to take certain labourers, whom they had engaged, before a Magistrate for examination and registration and for inducing the said labourers by false pretences to enter into a contract for labour to be performed by them in the French Colonies.

The Session Judge was of opinion that as the labourers were engaged at Coimbatore, the offence, if offence there was, was not committed within the jurisdiction of the Magistrate of Salem, and further that the prosecution not having been instituted by a person

authorised to institute prosecutions by Section 81 of the Act, the proceedings of the Magistrate were illegal. 1868. March 16.

The High Court are of opinion that the evidence shews that the holding out of false pretences to the labourers and thereby inducing them to enter into the contract did not take place within the Magistrate's jurisdiction. On this ground the conviction is illegal and must be quashed. The fine should be returned to the parties. It is unnecessary to consider the other question.

Appellate Side.

Proceedings, 16th March 1868.

UPON a question from the Magistrate of Malabar, referring certain proceedings of the Assistant Magistrate of Mangalore 1868. March 16.

The Court passed the following

The charge and finding in a case of causing hurt under Sec. 324 of the Indian Penal Code need not contain a negation that the hurt was caused on grave and sudden provocation.

RULING:—In this case the Assistant Magistrate convicted the accused of voluntarily causing hurt by a dangerous weapon, an offence punishable under Section 324 of the Penal Code.

The Magistrate on a revision of the Calendar remarked that the charge and finding were faulty as not containing a negation that the hurt was caused on grave and sudden provocation. To this the Assistant Magistrate demurred and submitted that he had followed the form of indictment provided in Section 239 of the Criminal Procedure Code, Clause 6.

The High Court are of opinion that the Legislature having provided an example of the indictment to be used that form must be held to be sufficient.

Appellate Side.

Proceedings, 16th March 1868.

UPON a question from the Session Judge of Salem, referring certain Proceedings of the Magistrate of Salem 1868. March 16.

1868. March 16.

The High Court passed the following

A conviction under Section 188 of the Penal Code, of disobedience of an order duly promulgated by a public servant, will not stand where the evidence fails to show that the disobedience caused, or tended to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, or that it caused, or tended to cause danger to human life, health, or safety, or caused or tended to cause a riot or affray.

RULING :—In this case the Magistrate has convicted the accused of disobedience to an order duly promulgated by a public servant punishable under Section 188 of the Penal Code. The order disobeyed was an order issued by the Collector forbidding the defendant to cultivate a certain piece of ground situate in the bed of a tank.

The Session Judge was of opinion that the conviction was illegal, because the evidence did not shew that the disobedience caused, or tended to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, or that it caused, or tended to cause danger to human life, health, or safety, or caused, or tended to cause, a riot or affray.

The High Court are of opinion with the Sessions Judge that there is no evidence to support the conviction. They accordingly order that the conviction be quashed, and that the fine, if paid, be returned.

Appellate Side.

Proceedings, 18th March 1868.

1868. March 18.

UPON a question, referring certain Proceedings of a 2nd Class Subordinate Magistrate,

The Court passed the following

A Subordinate Magistrate cannot bind over witnesses by recognisances to appear before himself.

The proper course to enforce attendance is by summons, and, if that fails, by warrant.

RULING :—In this case the Subordinate Magistrate bound over three witnesses by recognizances to appear before him on a certain date to give evidence on a charge of hurt. The witnesses not appearing on the day named, the amount of the recognizances, viz., 30 Rupees, was forfeited by the Subordinate Magistrate.

The Magistrate was of opinion that the forfeiture of recognizances was illegal, as there is no provision in the Code of Criminal Procedure for a Magistrate to take recognizances from parties to appear before himself.

1868. March 18.

The High Court agree with the Magistrate that the procedure of the Subordinate Magistrate was wrong and the recognizances mere nullities. The proper course to enforce the attendance of witnesses at a trial before himself was by summons, and if that failed, by warrant. The penalties levied from the parties must be returned.

The High Court have further to remark, that even if the recognizances had been valid, the summary mode of enforcing the penalties without allowing an opportunity of shewing cause was clearly an error in procedure which would have called for their interference.

Appellate Side.

Proceedings, 20th March 1868.

1868. March 20.

UPON the perusal of certain proceedings of the Session Judge of Salem

The Court passed the following

There is no rule of law that the uncorroborated evidence of an accomplice is insufficient for a conviction.
The proper form of the charge to the assessors in such cases stated.

RULING :—The Session Judge has acquitted the 13th prisoner on the ground that the uncorroborated evidence of an accomplice is in point of law insufficient for a conviction.

The High Court are not aware that there is any decision of this Court that the law is as stated by the Session Judge. The Judgment of the Court in Criminal Case No. 123 of 1863 delivered on the 16th November 1863 stated what the law was, and what should be the general rule of practice. Probably the Judge has misunderstood the Judgment in Criminal Petition No. 194 of 1867 and misapplied the reasoning in the present case. In that case it was laid down that the dissent of the Assessors and the circumstances of the case did not justify a departure from the general rule of practice. In the present case the Judge was apparently satisfied of the 13th prisoner's guilt and misled the Assessors into believing that he could not be convicted.

The finding as regards that prisoner and the reasons for the finding are equally unsatisfactory.

For the future guidance of the Session Judge, the High Court observe that the proper course in cases of this kind is to inform the Assessors, 1st, that there is no rule of law prohibiting the con-

1868. March 20.

viction of an offender upon the uncorroborated evidence of an accomplice; 2ndly, that as a general rule of practice, it is considered unsafe to convict upon such evidence; and 3rdly, to point at any circumstances in the particular case which, in the opinion of the Judge, afford a sufficient reason for relying upon the evidence in that case.

Appellate Side.

Proceedings, 1st April 1868.

1868. April 1.

UPON a reference from the Session Judge of Mangalore of certain Proceedings of the District Magistrate of South Canara,

The Court passed the following

Dismissal of a complaint under Section 269 of the Criminal Procedure Code, in consequence of non-attendance of the complainant, the order of dismissal having been passed before the trial commenced, amounts to a discharge without trial, and does not bar the complaint from being again preferred.

RULING :—In this case a complaint was made to a Subordinate Magistrate of offences punishable under Sections 143 and 352 of the Penal Code. Summonses were granted against ten persons and the trial fixed for 21st April. On 23rd April, the parties being in attendance, the Sub-Magistrate adjourned the inquiry. Fresh summonses were issued for the appearance of the parties on 6th June, on which date the inquiry was again adjourned for three days. On 10th June, the complainant having failed to appear, the complaint was dismissed, under Section 269 of the Criminal Procedure Code.

In the month of August the complainant again preferred his complaint before the District Magistrate, who investigated the case and convicted the prisoners on 18th September 1867. A sentence of fine and imprisonment was passed upon three of them, and upon the remaining seven, a sentence of one month's imprisonment each without fine.

On appeal to the Session Judge, the sentences of imprisonment and fine were annulled upon the merits of the case. The other sentences being not appealable under Section 411 of the Procedure Code, the Session Judge referred the Proceedings to the High Court on the ground that the order passed by the Sub-Magistrate under Section 269 of the Procedure Code was final and that the subsequent proceedings of the Magistrate were without jurisdiction.

On the facts stated in the present case the inquiry was adjourned, and the order dismissing the complaint or the non appearance of the complainant was passed before the trial was commenced. The High Court are of opinion that this amounted to a discharge without trial and did not bar the subsequent proceedings of the Magistrate. 1868. *April* 1.

Appellate Side.

Proceedings, 2nd April 1868.

UPON a reference by the Session Judge of Salem, 1868. *April* 2

The Court passed the following

Ruling :—The circumstances which led to the present reference were as follows :—

Magistrates of all grades are, under Madras Act III of 1865, competent to try persons charged with offences under Section 26 of the Railway Act XXIII of 1854.

A second class Subordinate Magistrate convicted two Railway watchmen under Section 26, Act XVIII of 1854, and considering the offence proved to call for a more severe punishment than he could inflict, referred his proceedings to his superior Magistrate who sentenced each of the prisoners to two years' rigorous imprisonment.

An appeal was preferred against this sentence to the Session Judge who quashed the conviction on the ground that Sections 37 and 38 of Act XVIII of 1854 operated to oust the Subordinate Magistrate's jurisdiction, and that the proceedings were illegal 'ab initio.' At the same time the Session Judge directed a new trial to be held by a Magistrate with full powers.

The Magistrate of the District thereupon called the attention of the Session Judge to Madras Act III of 1865, and argued that the Subordinate Magistrate had jurisdiction. To this the Session Judge replied that he could not discuss the question but would be prepared to explain the grounds of his decision if called upon.

The Magistrate then stated the case to the High Court and requested an authoritative ruling. The High Court called upon the Session Judge for the grounds on which his decision was based. The Session Judge replied that on further consideration he was of opinion that an offence falling under Section 26, Act 18 of 1854 was triable only by the Session Court, that in any case Madras Act III of 1865 does not give jurisdiction to subordinate

1868. April 2. Magistrates to try cases if the punishment awardable exceeds the limit which they are ordinarily competent to inflict, and that the Subordinate Magistrate should have committed the case for trial or have abstained from all inquiry.

The question for the consideration of the High Court is whether the offence described was triable.

(1). By a Magistrate with full powers.

(2). By a Subordinate Magistrate.

Previous to the passing of Madras Act III of 1865, the Criminal Courts had Jurisdiction according to the powers vested in them by the Criminal Procedure Code in respect of offences punishable under any special or local law except offences which were by any such law made punishable by some other authority therein specially mentioned.

In framing Act XVIII of 1854, it appears to have been the intention of the Legislature that all offences falling under Section 26 should be committed for trial to the Sessions Court, and should not be triable by a Magistrate. The cases in which Magistrates as defined in Section 38 may convict are specially described throughout the Act, and according to the ordinary principles of interpretation the jurisdiction of the Magistrate must be held to be excluded where not specially mentioned.

But Section 1 of Madras Act III of 1865 operates to remove this bar to the Magistrate's jurisdiction and renders every Magistrate competent to take cognizance of any offence committed against any special or local law notwithstanding any provision to the contrary in any Act or Regulation, provided only that the several grades of the Magistracy shall not exceed the limits of their ordinary jurisdiction as to the amount of punishment they may inflict.

The very wide words of this Section cannot in the opinion of the High Court be held to limit the jurisdiction to the power of committing for trial as distinct from the powers of convicting and punishing.

The Proceedings of the Subordinate Magistrate in the present case were not therefore without jurisdiction. If the case has again been investigated by a Magistrate with full powers and sentence passed, that sentence can stand. If the case is still under investigation, the second inquiry can be stayed and the previous sentence be restored.

The High Court are unable to say that the Magistracy used a sound discretion in dealing with the case. The offence under Section 26 was not, it would seem, the only offence committed. The prisoners were further liable under Section 25, and the better course would have been to commit them both for trial before the Court of Session.

1868. *April 2.*

Appellate Side.

Proceedings, 17th April 1868.

1868. *April 17.*

UPON perusal of certain proceedings,

The High Court passed the following

RULING :—In reviewing the Magistrate's Calendar, the Session Judge remarks that the extent of the former punishment mentioned in the second head of the charge should have been stated.

A charge alleging a previous conviction need not show the extent of the former punishment. Revised form of charge.

The High Court are of opinion that this is unnecessary, but on a re-consideration of the Proceedings abovementioned, they consider that the Form prescribed does not contain all the necessary particulars.

A charge alleging a previous conviction should run thus :—

"That he the said________before the committing of the "said offence was convicted on the_______day of_______ "in Calendar No.______of______on the file of______of an "offence punishable under Chapter XVII of the Penal Code with "imprisonment for a term of three years to wit the offence of "_________which conviction is still in full force and effect, "and that he is thereby liable to enhanced punishment under "Section 75 of the Penal Code and within the cognizance of "____________________________________

and the finding should be expressed in similar terms.

Appellate Side.

Proceedings, 1st June 1868.

1868. *June 1.*

UPON a reference by the Session Judge of Salem,

The Court passed the following

RULING :—The facts which gave rise to this reference are briefly as follows :—

1868.
June 1.

Right of way is a right of use of land within the meaning of Sec. 320 of the Criminal Procedure Code.

In consequence of disputes having arisen between Major Hunter, a resident on the Shevaroy Hills, and some Malayaly inhabitants of the adjacent villages as to the right of the latter to use certain paths intersecting Major Hunter's property, the Magistrate of the District held an inquiry into the matter, and decided that the public enjoyed rights of way along the said paths, and that Major Hunter should not take or retain exclusive possession of them until he obtained the decision of a competent Court in his favor.

The Session Judge was of opinion that the above order was illegal.

(1.) Because the Magistrate had no jurisdiction under Section 320 of the Criminal Procedure Code to deal with incorporeal rights such as rights of way.

(2.) Because the disputes were of long standing, and there was no proof that the right claimed had been *ordinarily* exercised within three months of the date of the institution of the inquiry.

The High Court are of opinion that right of way is a right of use of land within the meaning of Section 320 of the Criminal Procedure Code. A person whose land is not subject to servitudes of this nature may correctly be said to have exclusive possession, and, on the contrary, a person whose land is subject to such servitudes has something short of an exclusive possession. It has already been so held in the Proceedings of the 18th and 21st February 1867 with regard to disputes concerning easements of way and water. Whether in the present case the paths had been *ordinarily* used within three months was a question of fact to be decided upon the evidence, and the Court cannot say that there was not evidence on which the Magistrate might find such user.

Appellate Side.

Proceedings, 13*th July* 1868.

1868.
July 13.

UPON a reference by the Session Judge of Tinnevelly regarding certain proceedings of the Deputy Magistrate,

The Court passed the following

RULING :—The facts which gave rise to this reference are as follows :

The villagers of Pottakolam claimed the 'melvaram' produce of certain lands under an agreement executed by the Puttadar's husband in their favour and complained that when they went to receive their share of the crop, they were forcibly prevented from so doing by the defendant and others. The first defendant claimed the 'melvaram' produce under the pattadar and preferred a counter-charge against the complainants. The Deputy Magistrate found upon the evidence that the defendants were in possession, and passed an order under Section 318 confirming their possession. The Session Judge was of opinion that the order was illegal because there was no dispute as regards the possession of land—the possession being admittedly held by the cultivating ryots.

1868. *July* 13.

A Magistrate has no ground for proceeding under Chapter XXII of the Criminal Procedure Code where there is no dispute as to the fact of actual possession of either the land or crop.

2. The High Court agree with the Session Judge that the order of the Deputy Magistrate cannot stand. There was no evidence of a dispute as to the fact of actual possession of either the land or crop and consequently no ground for the Deputy Magistrate's proceedings under Chapter XXII of the Criminal Procedure Code. When there are sufficient grounds for apprehending that any other dispute as to lands or crops is likely to lead to a breach of the peace, the case can properly be dealt with under the provisions in Chapter XVIII. The order must therefore be set aside and both parties referred to a Civil Court for the adjustment of their claims.

The High Court remark that the Deputy Magistrate has not followed the procedure laid down by Section 318. He failed to record his reasons for being satisfied that a dispute likely to induce a breach of the peace existed.

Appellate Side.

Proceedings, 12*th August* 1868.

UPON a reference by the Session Judge of Guntoor regarding certain proceedings of the Acting Joint Magistrate of that Zillah,

1868. *August* 12.

The Court passed the following

1868. August 12.

The offences specified in Sections 411 and 414 of the Penal Code cannot be considered as two distinct offences so as to allow of the procedure of Sec. 46 of the Criminal Procedure Code being adopted.

RULING:—In this case the Joint Magistrate convicted four persons under Sections 411 and 414 of the Penal Code, and sentenced the second prisoner, who was an old offender, to 4 years' rigorous imprisonment. The question for consideration is, whether the offences specified in Sections 411 and 414 of the Penal Code can be considered as two distinct offences so as to allow of the procedure of Section 46 of the Criminal Procedure Code being adopted.

The High Court are of opinion that if there was evidence of the receipt of the property (and the evidence of the 4th witness and the prisoner's own statement were sufficient to establish this) the conviction should have been under Section 411. Section 414 applies only when there has been no actual receipt of the stolen property. The act of concealing or assisting in concealing stolen property does not aggravate the offence of receiving it, and the acts of the prisoner throughout must therefore be held to be parts of one single continuous transaction. With this view the sentence was illegal and must be annulled. The Joint Magistrate must now be directed to pass a new sentence in accordance with law under Section 411 of the Penal Code.

Appellate Side.

Proceedings, 19*th August* 1868.

UPON reading the Calendar in Case No. 36 of 1868, on the file of the Session Court of Tanjore, 1868. *August* 19.

The High Court made the following

The depositions of Gosha ladies examined before the Committing Magistrate in the presence of the accused are not admissible in evidence on the trial before the Session Court.

RULING :—In this case the Session Judge made use of Section 369 of the Criminal Procedure Code to put in evidence at the trial the depositions of six Gosha ladies who were examined on oath before the committing Subordinate Magistrate, in the presence of the accused persons.

One of these ladies having died since the preliminary inquiry, her evidence was of course admissible at the trial. As regards the other five depositions the High Court are of opinion that this evidence was improperly received, for the Section does not authorise such depositions being read at the trial when, as it appears here, the personal attendance of the deponents might have been procured by the process of the Court. A Gosha woman may, by reason of her rank, be legally exempted from appearance in Court, but here nothing of this kind appears.

There seems, however, no doubt that the accused were not in any way prejudiced by the statements contained in these depositions. With reference to Section 57 of Act II of 1855 and Sections 436 and 439 of the Criminal Procedure Code, there is therefore no ground for interference. It is sufficient to point out the irregularity committed.

Appellate Side.

Proceedings, 22*nd October* 1868.

CASE referred to the High Court by E. W. Bird, Session Judge of Tanjore under Section 434 of the Criminal Procedure Code. 1868. *October* 22.
Seven persons were convicted by the Deputy Magistrate of Tanjore under Section 432 of the Penal Code and directed to pay fines of Rupees twenty-five in each case. The charge against the de-

1868. October 22.

fendants was that they erected a dam across the bed of the river Aguiar a proceeding which they knew to be likely to cause an inundation over the lands of prosecutor's village named Ponnavayal. The prisoners admitted the erection of the dam but claimed to do so of a right and long custom. In support of their allegation the defendants produced a document executed by the villagers of Pallatur where the defendants lived and of Poovanam ; the execution of the document was not disputed, nor was it denied that the defendants had acted *bonâ fide* under it, but the prosecutor was no party to it. The Session Judge considered that the charge could only be established by showing that the defendants were guilty of mischief under the Penal Code, and he was of opinion that it was not shewn that the erection of the dam was likely to cause any damage to the prosecutor's lands or to the village lands of Ponnavayal. In the case of one of the defendants who was fined Rupees 60 and who appealed, the Session Judge reversed the conviction and he submitted the case as regarded the other defendants to the High Court on the following grounds :—1. That the defendants erected the dam under the right they conceived they had by virtue of an agreement between the villagers of Pallatur and Poovanam. 2. That there was no sufficient evidence to shew that the erection of the dam was likely to cause an inundation or any other injury to the lands in prosecutor's village. 3. That the defendants did not commit mischief.

The Court (*Scotland, C. J., Bittleston and Ellis, JJ.*) made the following

To constitute the offence of mischief according to the Penal Code the act done must be shown to have caused destruction of some property or such a change in the property or the situation of it as destroys or diminishes its value or utility or affects it injuriously. The probable consequential damage to other property would not of itself constitute mischief.

RULING.—In this case the Deputy Magistrate convicted eight persons under Section 432 of the Penal Code for erecting a dam across the bed of a river knowing it to be likely that the lands of the adjacent village would be in consequence inundated, and sentenced them to pay fines, the 1st Defendant 60 Rupees and the other Defendants 25 Rupees each. The 1st Defendant having appealed, the sentence as against him was reversed by the Session Judge, and the other sentences not being appealable the present reference was made.

2. In dealing with this case the High Court are unable to enter upon the question whether the evidence adduced was sufficient to support a conviction, as it is clear that there was

1868. October 22.

some evidence upon which the Deputy Magistrate might act. But it appears to them that the conviction cannot be maintained upon the following ground. To constitute the offence of mischief the act done must be shewn to have caused either a "destruction" of some property or "such a change in the property or the situa-"tion of it as destroys or diminishes its value or utility or affects "it injuriously." In the present case the act done was the erecting of a dam which certainly did not cause the destruction of any property, &c. It was the alleged probable consequential damage to other property which was the cause of complaint, and though that would authorise increased punishment under Section 432 it would not of itself constitute mischief. On this ground the convictions were illegal and must be quashed. The fines collected must be returned to the parties.

[*Collett, J.* dissented from this ruling on the ground that a knowledge of a likelihood to cause damage was sufficient and placing a dam across an irrigation channel was a change in its situation likely to be attended with damage and affected it injuriously.]

Appellate Side.

Proceedings, 31*st October* 1868.

1868. *October* 31.

UPON a reference by the Acting Magistrate of Madras,

The Court made the following

A Subordinate Magistrate has no power under the provisions of the Criminal Procedure Code to take recognizances from a complainant and witnesses to appear on a certain day before a Magistrate of co-ordinate jurisdiction and recognizances thus taken cannot be forfeited.

RULING:—In this case the Subordinate Magistrate took recognizances from a complainant and certain witnesses to appear on a certain day before a Magistrate with co-ordinate jurisdiction. The parties not having appeared when the case was called on some days subsequently their recognizances were forfeited.

The case falls within the ruling of the High Court of 18th March 1868, in which it was laid down that as no provision is made in the Criminal Procedure Code for taking recognizances from witnesses (and a complainant is in the same position as a witness) to appear at an adjourned enquiry before a Magistrate,

1868. October 31. the forfeiture of such recognizances is illegal. The order of the Subordinate Magistrate must be cancelled and the amount of the recognizances refunded.

Ordered accordingly.

Appellate Side.

Proceedings, 31st October 1868.

1868. October 31. UPON a reference by the Magistrate of Salem, under Section 434 of the Criminal Procedure Code,

The Court made the following

A Subordinate Magistrate has no power to order a recognizance executed by a prosecutor before a Police Station Officer binding himself to appear before the Subordinate Magistrate to be forfeited on the failure of the prosecutor to appear.

RULING:—In this case a recognizance was executed before the Police Station Officer of Karimangalam by a certain person binding himself to appear on the 20th April before the Subordinate Magistrate of Darmapuri to prosecute in a certain case. On the 24th April the case was called on for hearing and adjourned from time to time until 9th May on which date the prosecutor was absent and his recognizance was immediately, by order of the Subordinate Magistrate, forfeited. The High Court concur with the Magistrate that the act of the Subordinate Magistrate in enforcing the recognizance was clearly illegal. The amount should be refunded.

Appellate Side.

Proceedings, 4th November 1868.

1868. November 4. UPON a question from the Acting Session Judge of Chittoor,

The High Court passed the following

A conviction under Section 181 of the Penal Code is good, though the offence fall within Section 193.

But a sentence under Section 181 which awards no term of imprisonment is illegal.

RULING:—In this case the defendant was convicted under Section 181 of the Penal Code for giving false evidence as a witness in a Criminal case and sentenced to pay a fine of 25 Rupees.

The Session Judge refers the case on two grounds.

(1) Because no sentence of imprisonment was passed as required by Section 181 of the Penal Code; 1868. *November 4.*

(2) Because the offence falls within Section 193 of the Penal Code and was not cognizable by the Magistrate.

As regards the 2nd point the High Court have ruled in their Proceedings of 26th November 1867 (copy of which is herewith sent) that a conviction under Section 181 is good, though the offence fall within Section 193. But on the first ground mentioned by the Session Judge the sentence is illegal as it stands. The Magistrate must now be required to pass a new sentence in accordance with law, and it must be pointed out to him that the sentence must include some term of imprisonment (however short) to which a fine may be added at his discretion.

Appellate Side.

Proceedings, 13th November 1868.

UPON a reference by the Session Judge of Nundial, requesting the permission of the High Court to revise the sentence passed upon the 2nd prisoner in Session Case No. 43 of 1868, 1868. *November 13.*

The High Court made the following

A sentence duly passed and recorded cannot be revised by the Judge.

RULING:—It appears from this reference that the Session Judge at the last Sessions, after hearing Case No. 43 fully convicted both prisoners and sentenced them, but on thinking over the evidence again he has come to the conclusion that he ought not to have believed the evidence against the 2nd prisoner.

The High Court are not aware of any provision of the law which would authorize him to revise or suspend the conviction and sentence duly passed and recorded, and without some such express provision the Judges do not think that he had power to do so, nor can they give it to him. In the absence of an appeal the proper course is for the prisoner to apply to Government for a pardon, supporting his application by the Session Judge's revised opinion of the evidence against him.

Appellate Side.

Proceedings, 13th November 1868.

1868. *November* 13. CASE referred for the orders of the High Court by F. S. Child, the Session Judge of Tinnevelly, under Section 434 of the Code of Criminal Procedure. It appeared that a dispute occurred with respect to the use of a pagoda between two classes of worshippers. One of the parties complained to the Subordinate Magistrate that the other party had taken possession of a part of the pagoda. The Subordinate Magistrate instituted an inquiry and reported the result of it to the Joint Magistrate who passed a decision under Section 320 of the Code of Criminal Procedure. The Joint Magistrate, acting on the report of the Subordinate Magistrate, did not himself hold any inquiry. The Session Judge being of opinion that the decision of the Joint Magistrate, not having been founded upon an inquiry held by himself, was contrary to law, referred the case to the High Court.

The Court made the following

The inquiry contemplated by Chapter XXII of the Criminal Procedure Code is a personal inquiry before the Magistrate who makes the order.

RULING :—This order was issued by the Joint Magistrate under Section 320 of the Criminal Procedure Code, but was based on a report made to him by a Subordinate Magistrate without any personal inquiry by the Joint Magistrate.

The High Court agree with the Session Judge that the inquiry contemplated by Chapter XXII of the Criminal Procedure Code is a personal enquiry before the Magistrate who makes the order, and that the proceedings of the Joint Magistrate have not been in accordance with law.

The order is accordingly hereby quashed, but it will still be open to the Magistrate to institute a proper inquiry and issue another order if he thinks it necessary.

Proceedings, 23rd November 1868.

1868. *November* 23. UPON a question referred for the opinion of the High Court by the Magistrate of Salem, regarding fines inflicted by the Subordinate Magistrate of Tripatur, under Section 6, Act I of 1858,

The Court made the following 1868. *November* 28

RULING :—In each of these cases the Subordinate Magistrate has proceeded against a cultivator alleged to be bound by local custom to repair a certain extent of a river channel, and to have refused or neglected to comply with a proper requisition for such customary aid. The charge and finding set out this as an offence punishable under Section 6, Act I of 1858, and the Subordinate Magistrate appears to have assessed the value of the labour withheld in each case and to have levied a fine of double that amount.

The only acts or omissions over which a Magistrate has jurisdiction, under Act I of 1858, are those specified in the 1st Section. Cases under Section 6 of the Act are not cognizable by a Magistrate.

The only acts or omissions over which a Magistrate has jurisdiction under Act I of 1858 are those specified in the first Section, where a tank or other irrigation work has been breached or is in imminent danger of being breached. Cases under Section 6 are not cognizable by a Magistrate at all, but the Section points out distinctly the only mode in which the value of the labour withheld can be assessed or recovered.

The Subordinate Magistrate having acted without jurisdiction, the conviction in each case is quashed and the fines levied must be returned.

Appellate Side.

Proceedings, 31*st October* 1868.

READ Calendar in case No. 30 of 1868 on the file of the Session Court of Tranquebar. 1868. *October* 31.

In this case ten persons were charged before the Session Judge of Tranquebar with having, on the 26th March 1868, committed dacoity in the house of one Colundavaloo Chetty, under Section 395 of the Indian Penal Code. The Jury convicted eight of the persons charged, and the Session Judge sentenced them to punishments varying from eighteen months' rigorous imprisonment to seven years' transportation. The calendar of the Session Court contained the following statement :—

" The 10th witness was made an approver, and he as such gave a full statement of the robbery before the Sub-Magistrate of Vedarneum through whom the tender of pardon had been made. Before this Court however he denies all knowledge of any robbery having

1868. *October* 31. ever been committed in 1st witness's house as well as his Taluq statement. He however admits that he put his mark to a paper in the presence of the Sub-Magistrate of Vedarneum."

The High Court made the following

RULING:—The Session Judge should not have allowed the approver's evidence before the Subordinate Magistrate to be laid before the jury. The pardon to the approver is said to have been tendered through the Subordinate Magistrate, and it does not appear whether by a Magistrate with full powers or not. In the Proceedings of 11th February 1864, the High Court ruled that a Magistrate with full powers could not delegate this authority to a subordinate. The Session Judge is requested to explain what were the facts in this case.

A Session Judge should not permit the evidence of an approver who was examined as a witness before the Committing Magistrate to be laid before the Jury by whom the prisoners were tried.

[The Session Judge informed the High Court that the Sub-Magistrate sent the approver to the Deputy Magistrate of Manargoody who was vested with the full powers of a Magistrate with a recommendation that a pardon should be tendered to the approver, and this was done by the Deputy Magistrate. The Session Judge stated that the deposition of the approver was used at the trial as additional evidence, because the first and ninth witnesses for the prosecution declared that the approver gave it voluntarily, and it was duly subscribed by the Sub-Magistrate.

The prisoners presented appeals to the High Court against the sentences passed upon them. On the 9th December 1869, the High Court dismissed the appeals.]

Appellate Side.

Proceedings, 3*rd November* 1868.

1868. *November* 3. UPON a reference by the Session Judge of Nellore, submitting the record of case No. 3 of 1868 on the file of the Assistant Magistrate,

The Court passed the following

RULING:—The High Court do not think it necessary to go through the long correspondence that has passed between the Session Judge and the Magistrate upon this matter.

In an enquiry under Chapter XIX of the Criminal Procedure Code, the defendant should have an opportunity of

1868. *November 3.*

cross-examining the witnesses produced against him, of making his own statement, and of calling witnesses in his own behalf.

They have only to remark that it has been already ruled in the Proceedings of 9th May 1863, that a person dealt with under Chapter XIX Criminal Procedure Code is not a person "charged with or convicted of an offence," and a requisition of security cannot with any accuracy of language be called a punishment. But of course an enquiry under this chapter ought to be conducted with attention to the ordinary forms of Justice. The party defendant should have every opportunity of cross-examining the witnesses produced against him, of making his own statement, and of calling witnesses in his own behalf. But evidence to character (bad or good) should be general and not particular, it being of course open to the opposite side to cross-examine as to particulars as to the party may seem necessary or prudent. It is for the presiding Magistrate in his discretion to put such questions to the witnesses on either side as he considers needed to inform his own conscience. It is obviously necessary in this country that Magistrates should be discreet in acting under Chapter XIX and watchful that the Police are not allowed to abuse these extraordinary provisions, but as only Magistrates with full powers are competent to act under Chapter XIX, the High Court may fairly hope that the power given by this chapter will in general be exercised discreetly.

Appellate Side.

Proceedings, 22nd December 1868.

1868. *December 22.*

UPON a reference from the Magistrate of the Godavery District, forwarding, under Section 404 of the Code of Criminal Procedure, the record of a case decided by him under Act 1 of 1859, and requesting instructions as to whether he can pass a sentence of imprisonment on European British subjects under Act 1 of 1859 and with reference to Act 18 of 1859,

The Court made the following

RULING:—In the case submitted, a European British subject was convicted and sentenced to imprisonment by the Magistrate under clause 5, Section 83 of Act 1 of 1859, the Merchant Shipping Act. The question to be decided is whether or not the Magistrate had jurisdiction.

A Magistrate is not empowered to try an European British subject under clause 5, Section 83 of Act 1 of 1859, (the Merchant Shipping Act.)

1868. *December* 22. The only section in Act 1 of 1859 which expressly gives jurisdiction to any particular Court is the 112th which provides that "all offences under this Act made punishable by any penalty may be prosecuted summarily before a Magistrate." If this stood alone, it would perhaps be questionable whether a Magistrate or Justice of the Peace would have jurisdiction in such a case as the present, but that is a question which it is now unnecessary to discuss, for it appears to the High Court that Act 18 of 1859 removes all doubt from the subject. The intention and effect of that Act appear to be to give to the High Court jurisdiction over European British subjects in respect of all offences not before declared punishable otherwise than by a Magistrate—of all offences, that is to say, not expressly made punishable by the Justices of the Peace in the Mofussil. It very plainly declares that the law had made no provision in the case of European British subjects for the punishment of offences summarily punishable by a Magistrate, and confines the jurisdiction over such cases to the High Court. The law is not altered by the Code of Criminal Procedure, but its former provisions are expressly retained by the exceptions in Sections 24, 26.

The High Court are therefore of opinion that the Magistrate acted in this case without jurisdiction, and his proceedings are accordingly quashed.

Appellate Side.

Proceedings, 4th January 1869.

1869. *January* 4. CASE stated by the Session Judge of Salem for the orders of the High Court under Section 434 of the Code of Criminal Procedure.

From the Proceedings of the Session Court of Salem, it appeared that the first defendant preferred a written complaint to the Acting Head Assistant Magistrate of Salem in the month of July 1868, alleging that the second and third defendants had wrongfully broken down his hedge, and passed through the middle of his standing crop, and had thrown down part of a wall which the complainant had constructed to prevent the water from washing away his soil, and had abused and threatened to assault him. All the parties were made defendants on the ground that the dispute was likely to create a breach of the peace. The first defendant alleged that he had exclusive possession; and that the second and third de-

fendants never had any right of passage over it, but that they had always gone to their field by two lanes, one to the north and the other to the south of the 1st defendant's land. The second and third defendants' case was that their land and that of the first defendant originally belonged to the same owner, and that he used to pass over the land which now belonged to the first defendant when going to the other portion of the land, and that for the last thirteen years they have done the same. Four witnesses, called on behalf of the 1st defendant, declared that the 1st and 2nd defendant had always gone to their field by the two lanes and had never passed over the land of the 1st defendant. Four witnesses gave evidence on the part of the 2nd and 3rd defendants. One stated that for thirteen years the 2nd and 3rd had been in the habit of passing over the 1st defendant's land, but that for a year they had not done so. The other witnesses stated that the 2nd and 3rd defendants had always passed over the 1st defendant's land, but that they had not done so since May last.

The Acting Head Assistant Magistrate thought it probable that the pathway had not been used for the first time this year, because it was a short cut and the parties had held the adjacent lands for some thirteen years, but he was of opinion that the alleged right was not exercised throughout each year of the thirteen; the date of discontinuance in the present year, namely, Chittrai (April, May) leading him to the conclusion that it was not customary for the 2nd and 3rd defendants to pass over the land of the 1st defendant save at non-cultivation seasons. He therefore made an order under Section 320 of the Code of Criminal Procedure that exclusive possession of the right of way in question shall not be taken by 1st defendant against 2nd and 3rd defendants save at cultivation seasons only, that is, from the beginning of sowing until the end of reaping, or until the 1st defendant obtains the decision of a competent Court adjudging him to be entitled to the excusive possession he claims.

The Session Judge came to the conclusion that the order was contrary to law; 1st, because the 2nd and 3rd defendants, who alleged that they had a right of passage for themselves which they had exercised uninterruptedly for thirteen years, failed to prove that they had ordinarily exercised such right within three months from the date of the institution of the enquiry; and secondly because the 2nd and 3rd defendants did not allege that they, had such right of passage at non-cultivation seasons, and had exer-

1869. *January 4.*

cised such right during the last of such seasons, and it was not competent to the Magistrate to impose a new servitude upon the first defendant's land.

The High Court made the following

The Jurisdiction given by Section 320 of the Code of Criminal Procedure to decide for a time the right to enjoyment of property should not be exercised except on clear and satisfactory proof. Where the only evidence is that of user it should be such as to show satisfactorily acts of enjoyment exercised as a matter of right and permitted uninterruptedly for some considerable length of time.

RULING:—The order in this case was passed by the Head Assistant Magistrate under Section 320 of the Code of Criminal Procedure. It directs that "exclusive possession of a right of way" over 1st defendant's land "shall not be taken by the 1st defendant against 2nd and 3rd defendants save at cultivation seasons only, *i. e.*, from the beginning of sowing till the end of reaping, or until 1st defendant obtains the decision of a competent Court adjudging him to be entitled to the exclusive possession which he claims."

The grounds upon which the Session Judge considers this order illegal are two:—firstly, because the 2nd and 3rd defendants had not exercised the right of way which they claimed within three months of the institution of the enquiry; and secondly, because the right which they claimed was a right of passage at all times and not at cultivation seasons only, and that it was not competent to the Magistrate to impose on 1st defendant's land a servitude different from that claimed.

The High Court are unable to see any force in the latter objection. The fact that the parties set up a right to use at all times would not preclude the Magistrate from finding that they had the less right to use in the way claimed at particular seasons. The first objection then vanishes also, for the Magistrate having found the right to be one which "exists at particular seasons," it is non-user during the last season, and not non-user within the three months last past, which would preclude his making an order.

The facts of this case, however, have suggested to the Chief Justice and Judges the necessity of making it very clearly understood that the jurisdiction given by Section 320, to decide for a time the right to enjoyment of property, should not be exercised except on clear and satisfactory proof. Where, as in the present instance, the only evidence offered is that of user, it

should be such as to show satisfactorily acts of enjoyment exercised as a matter of right and permitted uninterruptedly for some considerable length of time. 1869. *January* 4.

Appellate Side.

Proceedings, 15th January 1869.

UPON reading the Proceedings of the Session Court of Rajahmundry, dated 17th December 1868, No. 65, 1869. *January* 15.

It appeared that five prisoners were tried by the Magistrate of the Godavery District for three separate offences under Section 457 of the Indian Penal Code, for that they had, on or about the 21st and 22nd of October 1868, broken into the houses of the three prosecutors at night and stolen property therefrom. The cases were numbered 33, 34 and 35 of 1868, on the file of the Magistrate of the Godavery District. The prisoners, who admitted their guilt, were convicted. In Nos. 33 and 34, no sentence was recorded. In No. 35 the Court found that the prisoners were guilty of the offences specified in the charges in case Nos. 33, 34 and 35, namely, that they had committed house-breakings by night with intent to commit theft, and directed that they be each rigorously imprisoned for a period of 4 years under Section 457 of the Indian Penal Code and Section 46 of the Code of Criminal Procedure.

The High Court made the following

Where prisoners are convicted of separate offences, a separate sentence should be passed on each case with a direction that the imprisonment in the second case should commence on the expiration of that in the first and so on.

RULING :—The Session Judge should have pointed out to the Magistrate that the form of his sentence is erroneous.

The prisoners were convicted of three separate offences, but the Magistrate has passed a single sentence of 4 years' rigorous imprisonment. If, on appeal, the conviction in one or two of the cases had been reversed, it would not have been practicable to determine to what portion of the aggregate imprisonment the prisoners remained liable. The proper course was to pass a separate sentence in each case directing, with reference to Section 46 of the Code of Criminal Procedure, that the imprisonment in the second case should commence after the expiration of that in the first and so on.

1869. *January* 15

A copy of these proceedings should be sent by the Session Judge to the Magistrate for his future guidance.

Appellate Side.

Proceedings, 16*th January* 1869.

1869. *January* 16.

UPON reading the Proceedings of the Session Court of Rajahmundry, dated 22nd ultimo in case No. 120 of 1868, on the file of the Joint Magistrate of the Godavery District,

The Court made the following

A Magistrate has no power to seize the property of a person convicted by him when the person convicted has not been directed to pay a fine. Nor has a Magistrate power to take property from one defendant and give it to another defendant.

RULING.—In this case there were two defendants before the Acting Joint Magistrate: the second was released under Section 250 of the Code of Criminal Procedure, but the first was convicted of theft and sentenced to rigorous imprisonment for 18 months. The first defendant appealed to the Session Court, but his appeal has been dismissed.

The property stolen consisted of four bullocks, two of which were subsequently purchased from the first by the 2nd defendant. The Acting Joint Magistrate finds that the bargain was made by the 2nd defendant without any guilty knowledge, and he was therefore properly discharged. But at the end of his Calendar the Magistrate says, " with the prisoner (1st defendant) there are Rupees 7-9, and this amount I have given to the 2nd defendant, as part of the purchase money paid by him."

It appears to the High Court that this part of the Magistrate's proceedings is bad for two reasons; first, because the 1st defendant has not been sentenced to fine, and without such sentence the Magistrate had no power to seize his property; secondly, the Magistrate had certainly no power to take the property of one defendant and give it to another. Section 44 of the Procedure Code provides for the award of compensation for loss or damage caused to any person by the offence, but the loss in this case caused to the 2nd defendant cannot be considered as a result of the theft within the meaning of that section.

A copy of these proceedings should be sent to the Acting Joint Magistrate by the Session Judge.

Appellate Side.

Proceedings, 4th February 1869.

1869. *February* 4.

UPON a reference by the Acting Magistrate of Cuddapah, referring for the orders of the High Court, under Section 434 of the Code of Criminal Procedure, the Proceedings of the 2nd Class Subordinate Magistrate of Rayachoty in Case No. 48 of 1868, as contrary to law, the Court made the following

Section 266 of the Code of Criminal Procedure only requires the Magistrate to hear such witnesses as the accused shall produce in his defence.

RULING:—This case has been referred as regards one of the prisoners on the short ground that the Subordinate Magistrate convicted him without examining two witnesses whom he cited, this being "contrary to the express provisions of Section 266, Chapter XV of the Code of Criminal Procedure." It does not appear however that this defendant produced the witnesses named by him, and Section 266 only requires the Magistrate to hear such witnesses as the accused shall produce in his defence. There is not in Chapter XV any provision corresponding to Section 253 in Chapter XIV. Sections 262 and 263 provide for the summoning of witnesses in certain cases, but it does not appear that this case was within Section 262, and the power given by Section 263 is entirely at the discretion of the Magistrate. The Subordinate Magistrate may have exercised an unwise discretion in not sending for defendant's witnesses, but the High Court are unable to say that there was an illegality in his proceedings requiring them to quash the conviction.

Appellate Side.

Proceedings, 5th February 1869.

1869. *February* 5. UPON a reference by the Magistrate of Bellary,

The High Court passed the following

RULING:—In this case 5 prisoners were convicted by the Gooty Subordinate Magistrate under Section 379 of the Indian Penal Code of having committed theft, in having dug up the carcase of a bullock which the owner, suspecting it to have been poisoned, caused to be buried.

A conviction for theft under the Penal Code is illegal if the owner has given up all property in and all possession of the subject of the alleged theft.

The High Court are of opinion that the conviction is illegal as the owner had obviously given up all property in, and also all possession of, the subject of the alleged theft. They accordingly quash the conviction and direct that the prisoners be forthwith discharged from custody.

Appellate Side.

Proceedings, 9th February 1869.

1869. *February* 9. READ letter dated the 7th January 1869, No. 4, from the Magistrate of South Arcot, forwarding for orders of the High Court a reference made by the Joint Magistrate in the matter of two cases thrown out by the Acting Judge without trial.

The accused were committed for trial to the Session Court of Cuddalore in cases Nos. 120 and 121 on the file of the Session Court. The accused had been already discharged under Section 225 of the Code of Criminal Procedure by the Sub-Magistrates of Manargoody and Verdachellum. The Joint Magistrates ordered the cases, which were exclusively triable by the Session Court, to be committed by the same Sub-Magistrates who had previously discharged them. The Session Judge discharged the accused without trial because the accused had been discharged under Section 225 of the Code of Criminal Procedure and the offences charged were only triable by the Session Court, and the commitments had not been directed by the Session Court under Section 359 of the Code of Criminal Procedure. The Session Judge observed that, in cases triable exclusively by the Session Court when the Magistrate of the District or other officer exercising the powers of a Magistrate was of opinion that there

had been an improper discharge of the accused by the Sub-Magistrate under Section 225, it was competent to the Magistrate to take up the case himself, and if necessary commit the accused, and he referred to Sections 225 and 425 of the Code of Criminal Procedure in support of his view.

1869. *February* 9.

In forwarding the proceedings for the consideration of the High Court, the Magistrate of South Arcot stated that the propriety of the committals seemed to hinge on the point whether the Sub-Magistrates concerned acted on their own convictions or merely in obedience or deference to the Joint Magistrate. The cases had been dismissed when the Joint Magistrate interfered as the supervising officer and recorded his own views, and it was after the receipt of this opinion in the form of an order that the subsequent committals were made. In noticing the case at all, the Joint Magistrate was strictly carrying out the orders of the High Court as communicated in the Government Proceedings of the 12th November 1867, and the Joint Magistrate explained that his interference was limited to a mere expression of opinion and was not intended by him to control the Sub-Magistrate, nor was it so viewed by the Sub-Magistrate.

The High Court passed the following

A Magistrate of the District has no power to direct a Subordinate Magistrate to commit for trial in the Session Court accused persons who have been discharged by the Subordinate Magistrate, and such committal when made by the Subordinate Magistrate is illegal. The Session Court is the only authority empowered by law to direct a committal.

Ruling :—The accused persons in these two cases were discharged by the Acting Session Judge of Cuddalore at the December Sessions without trial on the ground that their commitment had been illegal. They had been originally discharged by the Subordinate Magistrate at the close of his preliminary enquiry, but the divisional Magistrate took a different view of their criminality and urged his opinion upon the Subordinate Magistrate with such effect that the latter recalled his order of discharge, and upon the same evidence committed them to take their trial before the Session Court. The Acting Session Judge says that the commitment was ordered by the divisional Magistrate, but the Joint Magistrate himself denies this. He says that he exercised no pressure but the pressure of argument, that he left it quite open to the Subordinate Magistrate to form his own judgment, and that upon his representation of the law and facts of the case the Subordinate Magistrate perceived that he had been wrong and determined to commit. The High Court agree with the Acting Session Judge that under the circumstances

1869. February 9. the commitment must be taken to have been by order of the Joint Magistrate. The Subordinate Magistrate could not reasonably be expected to form a calm judgment after arguments had been addressed to him by his superior in the form of an order and with the avowed object among other things of "testing his powers of appreciating argument."

It was certainly the duty of the Joint Magistrate to record the opinion which he entertained of the defect in the Subordinate Magistrate's proceedings, but his remarks should have been made with the view of instruction and of checking a similar miscarriage in future, not in order to bring about a second and different decision in these particular cases. With regard to these his plain though undoubtedly more troublesome duty was to take them up himself afresh and make himself responsible for the commitments. This of course would not prevent a superior Magistrate from suggesting a further enquiry in a case where he considered that the enquiry had been defective and not merely that the Subordinate Magistrate had arrived at an erroneous conclusion. The Session Court is the only authority empowered by law to direct a committal.

The High Court think it right to add their opinion that under all the circumstances it is not expedient that any further proceedings should be taken in either case, unless indeed the parents of the girl in the case under Section 362 should choose to institute a fresh prosecution.

Appellate Side.

Proceedings, 12th February 1869.

1869. February 12. UPON reading the record of the evidence and proceedings in cases 5 and 6 of the Calendar of the Session Judge of Chingleput for 1869,

It appeared that two persons named Namashiva Charry, and Sadashiva Charry, described as goldsmiths and village shroffs, were tried and convicted by the Session Court of Chingleput upon charges of having, at Serukundrum, being public servants, that is to say village shroff, and being in that capacity entrusted with money due to Government, committed criminal breach of trust in respect thereof by criminally misappropriating the same and that they had thereby committed offences punishable under Section 409 of the Indian Penal Code. They were also charges of abetment against the prisoners under Sections 109 and 409 of the Penal Code.

1869. *February* 12.

It appeared from the evidence that it was the prisoners' duty to receive the Government dues and to give receipts for the amount received and to remit the amount to the Talook Officer, and that the amount so remitted fell short of the amount received by the prisoners and for which they had given receipts. The prisoners received maniem lands and perquisites for the performance of their duties.

The prisoners were charged in Nos. 2, 3, 4, 5 and 6 of 1868 on the file of Session Court of Chingleput, and Sadashiva Charry was convicted of four and the other prisoner of seven distinct offences.

In No. 6 only sentence was passed upon the prisoners, and Sadashiva Charry was ordered to undergo four years' rigorous imprisonment, and Namashiva Charry was transported for seven years, the first named under Section 409, and the other prisoner under Sections 109 and 409 of the Penal Code.

In No. 5 it appeared that grain and not money was received from the ryot, and the prisoners promised to give credit for Rupees 25-8 in respect thereof and gave a receipt for that amount.

The High Court made the following

A village shroff whose duty it was to assist in collecting the public revenue received grain from ryots and gave receipts as if for money received by virtue of a private arrangement. Held that he could not be convicted of criminal breach of trust by a public servant under Section 409 of the Penal Code, as he was not authorised to receive the public revenue in kind, and the party who delivered the grain did not thereby discharge himself from liability for the revenue.

RULING:—In these cases two goldsmiths or village money-lenders have been convicted on various charges of criminal breach of trust as public servants, that is to say, as village shroffs, whose duty it is among other things to assist in collecting the revenue. No sentence has been passed except in case No. 6, when the Session Judge took all the cases into consideration and sentenced the prisoners respectively to 4 years' rigorous imprisonment and 7 years' transportation under Section 409 of the Penal Code.

It appears to the High Court that the conviction in case No. 5 is bad. The 1st prisoner has thought fit to plead guilty, but his plea must be taken to have been to the facts only. In that case the prisoners received grain from certain ryots and in return granted receipts for the public revenue as if for money received. But this appears to have been merely a private arrangement. The shroff could not receive the grain as a public servant, for he

1869. February 12. was not authorised to receive the public revenue in kind: and the party who so delivered the grain did not thereby discharge himself from liability for the revenue.

Exactly the same objection applies to the conviction of both prisoners under counts 3 and 4 in case No. 6, but in this case the small sum of Annas 8 appears to have been paid in money, and in respect of this sum the conviction under Section 409 is good upon the 1st and 2nd counts.

The conviction therefore in case No. 5 is set aside, and that in No. 6 is also set aside except as respects the sum of 8 Annas on the 1st and 2nd counts. This being so and for other reasons it appears to the High Court that the sentences passed in No. 6 are very unnecessarily severe. It is accordingly ordered that they be and they hereby are modified, and instead of the punishments thereby imposed, the prisoners Sadashiva Charry and Namashiva-Charry are hereby sentenced to be kept in rigorous imprisonment for a period of 2 and 3 years respectively.

The Session Judge will observe that if the conviction in No. 6 had been found wholly bad, the entire sentence which legally stands as a sentence in No. 6 alone would have fallen through and there being no sentence at all in cases 2, 3 and 4, the prisoners must of necessity have been released. Section 46 of the Code of Criminal Procedure indicates the proper procedure to be followed when a prisoner is convicted at one time of two or more offences.

Appellate Side.

Proceedings, 12th February 1869.

1869. February 12. UPON a reference from the Acting Magistrate of Tinnevelly, referring for the orders of the High Court under Section 434 of the Code of Criminal Procedure, two orders passed by the Subordinate Magistrates of Sattur and Virduputty respectively, which the Magistrate considered contrary to law; the records of the cases showed that on the 13th of October 1868, the Sub-Magistrate of Virdupulli under Section 62 of the Code of Criminal Procedure issued an order addressed to Palukurapa Taver residing at Ragunada Tevarpati attached to Nedungulam which was in the following terms:—

Whereas on the Government Nattam land lying unoccupied in the said village, and which is of much service to the people in general, you have recently laid stones and constructed thereon a

granary with straw, which construction is likely to cause obstruction to the public, I do hereby direct that you shall within 15 days from this date remove the said granary and vacate the ground.

1869. *February* 12.

On the 17th October 1868, the Sheristadar, Sub-Magistrate of Satur Taluk issued under Section 62 of the Code of Criminal Procedure an order to two persons residing in the village of Sevalpulli. The order was as follows:—

Whereas it is brought to my notice that the north wall of the building occupied by you is in a falling state, that the south wall is weak, that the roof has fallen down, and that the said walls are likely to break down and thereby to cause danger to the people, you are hereby required to remove the walls and to clear the place.

Copies of the two orders were sent to the High Court by the Magistrate of Tinnevelly for the purpose of being set aside as being contrary to law.

The High Court made the following

Orders by Sub-Magistrates, in one case directing the removal of a house on the ground that it was in a dangerous and dilapidated condition, and in the other directing the removal of a granary on the ground that it had been improperly erected upon land required to be kept unoccupied for common purposes, were set aside by the High Court because the Sub-Magistrate acted without Jurisdiction.

Ruling:—In both these cases the directory part of the order is that a building shall be removed, but the reason stated is different: in the first case the ground is that the house is in a dilapidated and dangerous condition, while in the second the Subordinate Magistrate appears to have found that the building, a perfectly new granary, had been improperly erected without leave in a plot of ground required to be kept unoccupied for common purposes. No particular provision of the law is recited in either order, but they were probably intended to be passed under Section 62 of the Code of Criminal Procedure, which alone empowers a Subordinate Magistrate to pass an order of this description at all.

It is clear however that the first case would fall within the special provisions of the Chapter (XX) relating to local nuisances (Section 308) which, as frequently ruled, would exclude the general jurisdiction under Section 62. The second case may or may not fall under Chapter XX, but is certainly not within the purview of Section 62.

1869. *February* 12. The High Court are therefore of opinion that the Subordinate Magistrates in both cases acted without jurisdiction and their orders are accordingly hereby set aside.

Appellate Side.

Proceedings, 30*th April* 1869.

1869. *February* 12. UPON reading the Proceedings of the Session Court of Chingleput, dated 26th February 1869, reviewing on appeal the Proceedings in Calendar in Case No. 13 of 1869, on the file of the Joint Magistrate of Poonamallee, and also letter from the Session Judge of Chingleput, 1st April 1869, submitting the record in the above case in accordance with the Proceedings of the High Court, dated 23rd March 1869.

The High Court made the following

The High Court has power to mitigate a sentence passed by a Magistrate and confirmed on appeal by the Court of Session under Sections 405 and 428 of the Criminal Procedure Code.

RULING:—The Joint Magistrate convicted the accused under Section 456 of the Penal Code and sentenced him to 12 months' rigorous imprisonment and to pay a fine of 200 Rupees, or in default to suffer 6 months' further rigorous imprisonment. On appeal, the Session Court confirmed the conviction and sentence.

2. The High Court are of opinion that the sentence is unduly severe. Assuming the facts found by the Magistrate to have been proved, the sentence is wholly out of proportion to the offence. Under Section 405 of the Criminal Procedure Code, they resolve to reduce the sentence to three months' rigorous imprisonment.

3. As this is the first occasion on which the High Court have exercised their powers of revision under Section 405 in the case of a sentence passed by a Magistrate and confirmed on appeal by the Court of Session, the question was referred to a full Court and it was unanimously decided in accordance with a decision of the Full Bench in Calcutta on 20th June 1866, that reading Section 405 with Section 428, this Court has the power of mitigating a sentence passed by a Magistrate and confirmed on appeal. The Court entertain no doubt that the words in Section 405 " tried by any Court of Session" mean " tried by a Court of Session sitting either as a Court of Original or as a Court of Appellate jurisdiction."

Appellate Side.

Proceedings, 8th March 1869.

UPON receipt of a letter, dated 19th February 1869, from the Session Judge of Guntoor, submitting certain remarks with reference to the Proceedings of the High Court, dated 30th January 1869, 1869. *March* 8.

The High Court passed the following

According to Sec. 114 of the Penal Code, if the nature of the act constitutes abetment, the abettor, if present, is to be deemed to have committed the offence though in point of fact another actually committed it.

RULING.—The Session Judge convicted the 1st prisoner in Calendar Case No 1 of 1869 of Rape, and the 2nd, 3rd, and 4th prisoners of abetment of Rape. It was pointed out to him that the 2nd, 3rd, and 4th prisoners having been present aiding and abetting should, under the provisions of Section 114 of the Penal Code, have been convicted of the principal offence. The Session Judge now observes that in his opinion "the distinction between "doing an act and helping to do it, however much the guilt may "be the same, should, if possible, be preserved—otherwise that in "this case the 4th prisoner who kept away the other little girls "must be found guilty of having sexual intercourse with the "prosecutrix against her will."

2. The High Court observe that the difficulty under which the Session Judge appears to labor is purely imaginary and capable of easy solution. Section 114 of the Penal Code simply provides for the punishment of what the English Law calls principals in the second degree—A person present abetting an offence is to be *deemed* to have committed the offence, though he does not in fact do so any more than a principal in the second degree does. Hence "all who are present aiding and assisting a man to commit a Rape are principal offenders in the second degree whether they be men or women," (1 Russ. 905); and hence Lord Audley (3 Howell's St. Trials 401) was convicted as a principal of a rape on his own wife because he aided another to ravish her. There are several modes of abetment defined in the Penal Code. One is instigating another to commit an offence. If A instigates B to murder Z, he commits abetment; if absent, he is punishable

1869. March 8. as an abettor, and if the offence is committed, then under Section 109; if present, he is by Section 114 to be *deemed* to have committed the offence and is punishable as a principal. Another mode of abetment is by intentionally aiding, by any act or illegal omission, the doing of an offence. A aids B to murder Z; if absent he is punishable as an abettor and may be liable under Section 109; if present then he is to be *deemed* as much to have committed the offence as if he had struck the fatal blow. The meaning of Section 114 is that if the nature of the act done constitutes abetment, then, if present, the abettor is to be deemed to have committed the offence though in point of fact another actually committed it.

Appellate Side.

Proceedings, 8th March 1869.

1869. March 8. UPON a reference by the Acting Session Judge of Calicut, referring for the orders of the High Court, under Section 434 of the Code of Criminal Procedure, the Proceedings of the Acting Head Assistant Magistrate of Malabar, dated the 18th December 1868, as contrary to law,

The High Court made the following

When there is Evidence which would justify the finding of a Magistrate that an act likely to cause a breach of the peace had been committed, the High Court will not interfere with the Proceedings of the Magistrate.

RULING.—In this case the Head Assistant Magistrate took personal security from eleven persons to keep the peace for six months in sums varying from 200 to 50 Rupees each, and afterwards having found that an act likely to cause a breach the peace had been committed forfeited the recognizances of seven of the eleven.

2. The Session Judge referred the case on the grounds that the proceedings of the Magistrate had been irregular, no formal summons under Section 282 nor order under Section 288 of the Criminal Procedure Code having been issued, and that there was no evidence of acts likely to cause a breach of the peace.

3. The High Court understand the facts to be that there was a dispute between two sets or parties about the possession of certain land. The Magistrate refused to make any order about the possession and left the parties to their civil remedies, but he considered that there was danger of a breach of the peace and required security from both parties. The form of bond provided by

the Code and used in this case contains a condition not to do any act that may probably occasion a breach of the peace. Afterwards the Magistrate found that seven of the persons of one set so bound over had gone in a body and removed the produce of the land in dispute and he thought that this was such an act as to probably occasion a breach of the peace. That was a question entirely for the Magistrate upon the evidence. The act of taking away the produce of land the possession of which is in dispute may be done in such an orderly manner as to be a mere peaceful exercise of a supposed right of property or it may be done in such a disorderly manner or with such a show and preparation of force as to be provocative of a breach of the peace and to indicate an intention to exercise the supposed right at all risks and not merely in an ordinary and peaceful manner. It was for the Magistrate to judge of the character of the act upon the evidence and there was evidence in this case which would justify him in either view. 1869. *March 8.*

4. On this view of the case the High Court see no ground for setting aside the Magistrate's order as illegal. The informality of the Head Assistant Magistrate's proceedings remarked on by the Judge should be pointed out to him, but it is not sufficient of itself to invalidate the final order.

Appellate Side.

Proceedings, 9th March 1869.

UPON reading the Calendar in Case No. 5 of 1869, on the file of the Session Court of Vizagapatam, 1869. *March 9.*

The High Court passed the following

In a trial before a Session Judge with Assessors when the prisoner pleads not guilty and the Public Prosecutor does not offer evidence in support of the charge the Judge ought to instruct the Assessors that they are bound to find the prisoner not guilty.

RULING.—The High Court observe that the opinion of the Assessors was not recorded in writing as required by Section 324 of the Criminal Procedure Code. The Session Judge states that, as no evidence was offered, there was no question to be put to the Assessors. The proper course would have been to have called upon the prisoner to plead to the charge, and on the plea of not guilty being recorded and the public Prosecutor not being able to offer evidence in support of the charge, to have instructed the Assessors that they were bound to find the prisoner not guilty.

Appellate Side.

Proceedings, 23rd March 1869.

1869, *March* 23.

UPON reading the proceedings of the Session Court of Tinnevelly, reviewing the proceedings of the Acting Head Assistant Magistrate of Tinnevelly, dated 30th November 1868,

The High Court made the following

Under Section 273 of the Code of Criminal Procedure a full power Magistrate may refer for enquiry to a Subordinate Magistrate Criminal cases that is primâ facie any Criminal Case. The reference may be for enquiry or for trial by the Sub-Magistrate or with a view to commitment either to a Court of Session or the High Court.

RULING:—The Session Judge observes as follows:—"This is "clearly a charge of extortion coming under Section 383 of the Penal "Code, the accusation being that certain parties by threats of various "kinds compelled the complainant to "pay a certain sum of money as a "fine.

"Now offences coming under "Section 383 are punishable by the "Magistrate of the District or Court of Session, and this being a "very petty case is certainly not a case for committal to the "Court, and the Head Assistant Magistrate evidently so considered "it, for he on referring it to the Sub-Magistrate did not refer it "to him for committal on proof, but for preliminary enquiry and "report to himself.

"Now it appears to me that Section 273 does not apply to "cases of this nature, nor do I think that a Magistrate can refer "such a case as this for preliminary enquiry and report to himself. "Section 273 restricts such references to cases which the Sub-"Magistrates can dispose of or should, if proved, commit to Court; "but this is neither one nor the other, and Section 135 applies only "to cases in which apprehension can take place without a warrant: "and where it is requisite that a local enquiry should be made, "the words being *to proceed to the spot*; and this is no such charge.

"I am therefore of opinion thatt he Acting Head Assistant "Magistrate was wrong in referring this charge to the Sub-Magis-"trate as he has done and dismissing it on his report, and direct "him to take it up and hold the necessary enquiry according to "law, for up to this time he has made no enquiry regarding the "charge before him."

2. The High Court are of opinion that the construction put by the Session Judge upon Section 273 of the Criminal Procedure Code is wrong. The terms of that Section are quite general. Criminal cases *may* be referred, *i. e.* primâ facie *any criminal case.* 1869. *March* 23.

3. The reference may be (1) for enquiry, (2) for trial by the Sub-Magistrate, (3) with a view to a commitment either to a Court of Session or the High Court. The words "for enquiry" cannot mean for *preliminary enquiry* under Chapter 12, for that is expressed immediately afterwards in the same Section. They must be used in their general and ordinary meaning. Then Section 67 allows a Magistrate to dismiss a complaint if in his judgment there be no sufficient ground for proceedings. Section 273 allows a criminal case brought before a full power Magistrate on regular complaint before him to be referred "for enquiry" to a Sub-Magistrate, and when he has got the result of the enquiry, he might act under the latter part of Section 67. In this view the procedure of the Magistrate was regular.

Appellate Side.

Proceedings, 24*th March* 1869.

UPON a reference by the Magistrate of Bellary, referring for the orders of the High Court, under Section 434 of the Code of Criminal Procedure, the order of the Subordinate Magistrate of Hudgully dismissing a complaint, as contrary to law, 1869. *March* 24.

The High Court made the following

A Subordinate Magistrate has no power to dismiss a charge of criminal misappropriation under Section 403 of the Penal Code for non-appearance of the complainant under Section 259 of the Code of Criminal Procedure. That Section only applies to cases which fall within Chapter XV of the Criminal Procedure Code.

RULING:—The Subordinate Magistrate has quoted Section 259 of the Criminal Procedure Code as the Section under which the case was dismissed. This is clearly wrong, for Section 259 can only apply to cases which fall within Chapter XV of the Criminal Procedure Code. The present charge was of the offence of criminal misappropriation of property punishable under Section 403 of the Penal Code, and triable therefore according to the provisions of Chapter XIV.

1869. *March 24.* 2. Then had the Subordinate Magistrate any power to dismiss the complaint under Chapter XIV for non-appearance of the complainant? He might have adjourned the case under Sections 249 and 224, but if he had reason to believe that the charge could not be substantiated, (and this may have been the case), there was nothing to prevent his dismissing the complaint as he might have done under Section 67 before the process to compel the defendant's appearance was issued.

3. The High Court do not therefore consider that it is necessary to interfere in the way suggested by the Magistrate, for there has been no acquittal, and there is consequently no objection to the charge being again entertained by a competent Court. It is sufficient to point out to the Subordinate Magistrate that the Section quoted by him is inapplicable.

Appellate Side.

Proceedings, 6th April 1869.

1869. *April 6.* UPON reading the Proceedings of the Session Court of Madura, dated 16th March 1869, reviewing on appeal the Proceedings in Calendar Case No. 18 of 1869 on the file of the Acting Joint Magistrate of Madura,

The High Court made the following

The offence of dishonest retention of stolen property under Section 411 of the Penal Code may be complete without any guilty knowledge at the time of receipt.

RULING:—The Session Judge observes that the whole gist of the offence described in Section 411 of the Penal Code consists in guilty knowledge at the time of the receipt. This is true only of a charge of "dishonest receipt of stolen property." The offence of "dishonest retention of stolen property" may be complete without any guilty knowledge at the time of receipt.

Appellate Side.

Proceedings, 7th April 1869.

1869. *April 7.* UPON reading letter from the Magistrate of Malabar, referring for the orders of the High Court the question whether a Magistrate can record a finding in a criminal case upon evidence partly recorded by himself and partly by his predecessor,

The High Court passed the following 1869. April 7.

RULING:—The High Court observe that until the finding is recorded the trial is incomplete. If before the finding is recorded the presiding officer of a Court is from any cause removed, the successor cannot pass Judgment upon a consideration of the evidence recorded by the predecessor. The proceedings in the trial must be held entirely de novo.

Until the finding is recorded the trial is incomplete. If before the finding is recorded the presiding officer of a Court is removed the successor cannot pass Judgment upon considera-tion of the evidence recorded by the predecessor.

Appellate Side.

Proceedings, 8th April 1869.

UPON a reference by the Acting Civil Judge of Tanjore, requesting an authoritative ruling as to the construction to be placed on Section 22, Regulation XIV of 1816, 1869. April 8.

The High Court made the following

RULING.—The question raised is whether a Vakil who appears for the plaintiff in a suit can, if the suit be remanded for the trial of an issue by the Appellate Court, take a Vakalatnamah from the defendant, and the solution thereof turns upon the meaning of the words *same cause* in the above enactment.

When a suit is remitted by order of an Appellate Court for re-hearing or finding on an issue the proceedings on such order must be regarded as a further proceeding in the trial of the suit, and consequently under Section 22 of Regulation XIV of 1816 a Vakil cannot change sides and hold a Vakalatnamah for the party opponent to the one for whom he appeared at the first hearing.

2. The High Court are of opinon that the word *cause* means *suit*, and that the construction put upon Section 22 of Regulation XIV of 1816 in the ruling of this Court dated 30th April 1867 *that a vakalutnamah does not operate beyond the decree in the suit* was intended only to exclude subsequent proceedings in the regular course of the suit in the Original Court founded on the decree. When a suit is remitted by order of an Appellate Court for a re-hearing or finding on an issue, the proceeding on such order must be regarded as a further proceeding in the trial of the suit, and consequently under Section 22 of Regulation XIV of 1816 a Vakil cannot change sides and hold a Vakalutnamah for the party opponent to the one for whom he appeared at the first hearing.

1869. April 8. The Rules of Practice that if a suit be remanded under Section 351 of the Civil Procedure Code, the pleader's fees are to be calculated at one-fourth of the fees in a regular suit decided on the merits in accordance with Section 7, Regulation I of 1846, and that a fresh Vakalutnamah is not required from a Vakil who appears at an adjourned hearing after a finding upon issues referred under Section 354 of the Civil Procedure Code has been returned, seem to show that the ruling of the Sadr Court dated 5th November 1859 *that a pleader retained by one party in a suit is not precluded from afterwards accepting a Vakalutnamah from the other if the same cause or interest again come under adjudication*, referred to separate suits that might afterwards arise on the same subject matter.

Appellate Side.

Proceedings, 9th April 1869.

1869. April 9. UPON a reference by the Magistrate of Salem, referring for the orders of the High Court, under Section 434 of the Code of Criminal Procedure, the proceedings of the Subordinate Magistrate of Darampuri, as contrary to law,

The High Court made the following

Where a defendant charged with an offence bound himself to appear before a Sub-Magistrate on the 10th June and the defendant did appear on that day but made default on the 11th of June on which the case was called:—*Held* that there was no forfeiture of the recognizance. In such cases Section 219 of the Code of Criminal Procedure requires that the Magistrate shall form a reasonable opinion that there has been wilful default before issuing process to enforce the penalty.

RULING.—In this case the Subordinate Magistrate issued a warrant for the arrest of a person charged with the offence of criminal trespass. The warrant was endorsed to the effect that if the person to be arrested should give personal bail for 50 Rupees to appear on a certain date he should be released. Bail was accordingly given for his appearance before the Subordinate Magistrate, and on the day appointed he was present at the Subordinate Magistrate's Court. The case in which he was defendant was called on the following day, and on his making default the amount of his recognizance was forfeited by order of the Subordinate Magistrate.

2. The Magistrate refers the case on the ground that in the proceedings of 18th March 1868 the High Court expressed an opinion that the forfeiture of recognizances without giving the party an opportunity of showing cause why the penalty should not be enforced was a material error of procedure.

1869. April 9.

3. The High Court observe that the bond executed by the defendant in the present case did not, as stated by the Joint Magistrate, bind the party executing it to appear on the day named and on any subsequent date until the case was closed. The defendant merely bound himself to appear on the 10th June, and on the facts stated by the Joint Magistrate it appears that he fulfilled this condition. The forfeiture of his recognizance because he did not also appear on the 11th June was clearly illegal, and the penalty levied from him must be refunded.

4. As regards the question raised by the Magistrate, the proceedings of 18th March 1868 related to witnesses, and, as was then pointed out, there is no provision of the Code authorizing a Magistrate to take recognizances from them. In the present case the Subordinate Magistrate acted under Section 219 of the Code of Criminal Procedure, and there is no obligation imposed by that Section on a Magistrate to call upon the defaulting defendant to show cause before enforcing the penalty. But the Section does require that the Magistrate shall form a reasonable opinion that there has been a wilful default before issuing process to enforce the penalty. This the Magistrate does not appear to have done in the present case, and were it not that the penalty has been refunded on another ground the High Court are of opinion that he ought to be required to hear what the defendant has to say against the exaction of the penalty.

Appellate Side.

Proceedings, 13th April 1869.

1869. April 13.

UPON a reference by the Magistrate of South Arcot, referring for the orders of the High Court, under Section 434 of the Code of Criminal Procedure, the order of the 2nd Class Subordinate Magistrate of Vanoor,

The High Court made the following

Where the condition of bail bonds given by the defendants and by the surety of a security bond was that the defendants should appear when called upon —Held that the defendants and their surety were entitled to reasonable notice of the time at which the former would be required to attend.

RULING.—The Subordinate Magistrate issued summonses for five persons on a charge of theft. Four out of the five persons appeared in obedience to the summons and a warrant was then issued for the fifth. Pending his arrest the other four defendants gave personal recognizances to appear when required to answer the charge made against them, and one

1869. April 13. Narayana Reddy executed a security-bond for the due fulfilment of their engagements. This was on 12th September. On 18th September the Magistrate called on the case, and as the defendants did not appear he issued a notice to their surety Narayana Reddy to show cause why proceedings should not be had to compel payment of the penalty mentioned in the security-bond. On the 29th September, Narayana Reddy not having put in an appearance, a warrant of attachment was issued and 200 rupees were accordingly collected.

The Magistrate refers the case on the ground that the forfeiture of the surety's recognizance was unwarranted.

2. The High Court are of opinion that the natural construction to be placed on the bail-bonds given by the defendants and the security-bond given by their surety was that the defendants should appear when called upon or forfeit the penalties. Both the defendants and their surety were therefore entitled to reasonable notice of the time at which the former would be required to attend. It appears from the record that no notice of any kind was given, and there was therefore no ground for calling upon the surety to show cause why the penalty mentioned in the bond should not be enforced. On this ground the warrant of attachment was illegal. The order of the Subordinate Magistrate must be quashed, and the money collected from the surety (200 rupees) refunded to him.

Appellate Side.

Proceedings, 26th April 1869.

1869. April 26. UPON reading the proceedings of the Session Court of Cuddalore, dated 6th April 1869, reviewing the proceedings of the Assistant Magistrate of South Arcot in Calendar Case No. $\frac{1}{7}$ of 1869,

The High Court made the following

1869. *April 26.*

RULING :—The Assistant Magistrate required security from three persons in two sureties of 500 Rupees each for their good behaviour under Section 296 of the Criminal Procedure Code, and in default sentenced them to six months' rigorous imprisonment. The Session Judge was of opinion that the security demanded was excessive, and that the Assistant Magistrate had shown a great want of judgment.

Where a Magistrate required security from persons for their good behaviour under Sec. 296 of the Criminal Procedure Code, and in default sentenced them to six months rigorous imprisonment, held that the order was illegal, Sec. 301 requiring that they should be committed to prison until they furnish the security demanded. In fixing the amount of security the Magistrate should not go beyond a sum for which there is a fair probability of the defendant being able to find security.

2. The High Court are not satisfied that the Magistrate exercised a proper discretion in requiring security in so large a sum from persons who admittedly had no means of livelihood. The power given by the Section is one that should be exercised discreetly, and in fixing the amount of security the Magistrate should consider the station of life of the person concerned and should not go beyond a sum for which there is a fair probability of his being able to find security. The imprisonment, it must be remembered, is provided as a protection to society against the perpetration of crime by the individual and not as a punishment for a crime committed, and being made conditional on default of finding security, it is only reasonable and just that the individual should be afforded a fair chance at least of complying with the required condition of security.

3. The Magistrate's order in the present case sentencing these persons in default of finding security to rigorous imprisonment for six months is clearly illegal. Section 301 provides that they should be committed to prison until they furnish the security demanded. Had the Magistrate followed the form recently laid down by the High Court be would not have fallen into this error.

Furthermore, separate proceedings should have been taken against each individual as required by the Proceedings of the High Court, dated 17th March 1863. It does not appear that there was any association between them which would justify a contrary course.

1869. April 26. In Column 3 of the Calendar submitted by the Magistrate to the Session Court the entry is "Security for good behaviour under Section 296 of the Procedure Code." If the Calendar form was used it should have been "That they the said———— are by repute robbers," &c. But the Calendar form is not adapted to miscellaneous Proceedings of this nature.

4. The order of the Assistant Magistrate must be amended so far as regards the award of rigorous imprisonment. The form prescribed by the High Court for use under Section 296 of the Procedure Code should be adopted for the warrant of commitment.

Appellate Side.

Proceedings, 12*th May* 1869.

1869. May 12. A REFERENCE having been made by the Magistrate of Bellary, referring for the orders of the High Court, under Section 434 of the Criminal Procedure Code, a question as to the legality of an order issued by the Subordinate Magistrate of Huvinhadgally under Section 184 of the Criminal Procedure Code,

The High Court made the following

The words "order the attachment of any moveable or immoveable property" in Section 184 of the Criminal Procedure Code are enabling and not restrictive, and the Magistrate may attach both kinds of property. But he must issue his warrant of attachment simultaneously with the proclamation if he resorts to attachment at all.

Ruling :—The order issued by the Subordinate Magistrate under Section 184 of the Criminal Procedure Code directed the attachment of the moveable and immoveable property of the absconding party, and was issued a month after the proclamation under Section 183 had been issued.

The Deputy Magistrate was of opinion that Section 183 does not warrant the attachment of moveable *and* immoveable property, and that the warrant of attachment under Section 184 must be issued simultaneously with the proclamation under Section 183. The Magistrate was of a contrary opinion and submitted the questions raised for the orders of the High Court.

2. The High Court are of opinion that the words *order the attachment of any moveable or immoveable property*, in Section 184, are enabling and not restrictive. The Magistrate may attach both kinds of property. But the words '*at the same time*' must be taken in their literal sense and he must issue his warrant of attachment simultaneously with the proclamation, if he thinks fit to resort to attachment at all.

Appellate Side.

Proceedings, 15*th May* 1869.

UPON reading a letter dated the 11th November 1868 from the Session Judge of Tanjore, referring for the orders of the High Court, under Section 434 of the Code of Criminal Procedure, the order of the Deputy Magistrate of Mannargudi, dated 29th September 1868, as contrary to law, and Criminal Petition No. 248 of 1868, presented by Saminada Pillay, praying the High Court to revise the proceedings of the Deputy Magistrate, and also letters dated 23rd February and 15th March 1869 from the Session Judge of Tanjore, submitting translations of the whole record of enquiry before the Deputy Magistrate and the finding recorded by the Deputy Magistrate in accordance with the Proceedings of the High Court dated 27th November 1868,

1869. *May* 15.

The High Court made the following

In order to give a Magistrate jurisdiction to make an order regarding the possession of land under Section 318 of the Code of Criminal Procedure, he must be satisfied that there exists a dispute likely to induce a breach of the peace, and he must record the grounds of his being so satisfied. It is not sufficient that there is a mere scintilla of evidence, but there must be some evidence from which the Magistrate may reasonably draw the necessary conclusion of fact. The question whether any such evidence existed is one for the consideration of the High Court.

RULING :—The circumstances which gave rise to this reference are as follows :—Disputes had for a long time existed regarding certain lands in 20 villages of the Mannargudi taluq between Venkatachalla Pillay on the one hand and Saminada Pillay and Rajam Pillay on the other hand. Complaints and counter-complaints of criminal trespass and theft were preferred before the Magistracy, and on the 3rd September 1868 the Deputy Magistrate recorded proceedings under Section 318 of the Criminal Procedure Code that he was satisfied that a dispute likely to induce a breach of the peace existed and called upon the parties to put in a written statement of their respective claims. The case came on for hearing on the 29th September, and the Deputy Magistrate, after taking evidence, declared Venkatachellam Pillay to be in possession of the lands and entitled to retain possession until ousted by due course of law.

1869. May 15. 2. The Session Judge referred the order of the Magistrate as illegal on the ground that there was no evidence to justify the Magistrate's finding that a breach of the peace was likely to ensue.

3. The High Court before passing orders directed the Deputy Magistrate to record a specific finding whether Venkatachellam Pillay was in actual possession of all or any of the lands in dispute, or whether he held constructive possession merely by means of tenants. At the same time they directed that translations of the whole record should be submitted.

4. The whole of the voluminous records are now before the High Court, and the Deputy Magistrate has returned a finding that, as regards the lands in statement I, Venkatachellam Pillay was in actual possession, and as regards the lands in statement II, in constructive possession by means of tenants. So far as it relates to the lands in statement No. II, the order of the Deputy Magistrate is clearly illegal on the principle laid down in the proceedings of the High Court dated 13th July 1868.* The High Court have further to consider whether so far as it relates to the lands in statement I it can be held valid. In order to give the Magistrate jurisdiction to make an order regarding the possession, he must first be satisfied that there exists a dispute likely to induce a breach of the peace and he must record the grounds of his being so satisfied. These grounds must of course be based upon evidence and not derived merely from his own moral consciousness and though, where there is evidence on which the Magistrate might come to such a conclusion, the High Court cannot constitute themselves judges of its credibility or weight, it is not sufficient that there is a mere scintilla of evidence, but there must be some evidence from which the Magistrate may reasonably and fairly draw the conclusion of fact necessary in the case, and the question whether any such evidence existed is for the consideration of the High Court on revision. Now in the present case, the only evidence which the Deputy Magistrate acted upon was the existence of four complaints and counter-complaints made before hte Magistracy, and taken by itself, it rather indicated a disposition to resort to legal remedies and not that a breach of the peace was likely to ensue. The High Court are therefore of opinion that there is the absence of any reasonable evidence, and that the Deputy Magistrate was not justified in putting Section 318 of the

* IV. H. C. Reports, Rulings, XII.

Criminal Procedure Code in motion as regards the lands in statement No. I. The order of the Deputy Magistrate must therefore be set aside as illegal, and the parties referred to the Civil Courts for the settlement of their respective claims. 1869. *May 15.*

5. The High Court in conclusion must note their displeasure that so much time has been wasted by the Magistrate in investigating a case of a purely civil nature. Interference in such cases on the part of the Magistracy is most mischievous, and it is the duty of every Session Judge and District Magistrate to exercise a careful supervision over his subordinates to prevent the Criminal Courts being used for the decision of civil disputes. The High Court have reason to believe that under the head of Criminal trespass, misappropriation of property, &c., many *bonâ fide* acts of ownership are treated as criminal offences.

Appellate Side.

Proceedings, 18th May 1869.

UPON a reference by the Magistrate of South Arcot, referring for the orders of the High Court, under Section 434 of the Code of Criminal Procedure, the Proceedings of the 2nd Class Subordinate Magistrate of Trikalore in Cases Nos. 22, 23, and 24 of 1869 on his file, 1869. *May 18.*

The High Court made the following

By virtue of Sections 1 and 2 of Madras Act I of 1863 and the proviso in Section 273 of the Code of Criminal Procedure, a Subordinate Magistrate is enabled to convict persons accused under Section 174 of the Penal Code for disobedience to summonses issued by himself.

RULING :—In these cases the Subordinate Magistrate convicted the accused under Section 174 of the Penal Code for disobedience to Summonses issued by himself. The defendants admitted the service of the Summonses and their default.

The Deputy Magistrate was of opinion that a Subordinate Magistrate had no authority to punish for disobedience to his own order under Section 174 of the Penal Code unless the case was referred to him for trial by a superior Magistrate under Section 273 of the Criminal Procedure Code.

2. The High Court observe that the Deputy Magistrate has apparently overlooked the provisions of Sections 1 and 2, Madras Act I of 1863, by the first of which it is expressly enacted that a Subordinate Magistrate who issued the Summons or any other

1869. May 18. Subordinate Magistrate may take cognizance of an offence punishable under Section 174 of the Penal Code; and by the second, of which the 7th column of the Schedule annexed to the Code of Criminal Procedure, referring to Section 174 of the Indian Penal Code, is amended. Reading these Sections of Madras Act I of 1863 with the proviso in Section 273 of the Criminal Procedure Code, the procedure of the Subordinate Magistrate was perfectly regular.

3. The High Court observe that the cases before the Subordinate Magistrate were disposable under Chapter XV of the Code of Criminal Procedure. It was not therefore proper to draw up a formal charge. The substance of the complaint should have been stated and the accused called upon to show cause (Section 265.)

Appellate Side.

Proceedings, 26th July* 1869.

1869. July 26. UPON reading a letter, dated 22nd May 1869, from the Magistrate of South Arcot, pointing out, with reference to para. 2 of the Proceedings of the High Court, dated 18th May 1869, that Madras Act I of 1863 has been repealed by Madras Act IV of 1867,

The High Court made the following

A Subordinate Magistrate who issues a summons may take cognizance of the offence of disobedience to that summons, notwithstanding the repeal of Madras Act I of 1863.

RULING:—In passing the Proceedings dated 18th May 1869 (a) the High Court overlooked the fact that the special Act enabling a Subordinate Magistrate who issued a summons to take cognizance of the offence of disobedience to that summons had been repealed. The Legislature appear to have considered that Madras Act I of 1863 had been practically superseded by Act VIII of 1866 and therefore repealed it, but Act VIII of 1866 does not preserve the effect of the words *Who issued a Summons.* It simply brings certain offences including Disobedience to a Summons as defined in Section 174 of the Penal Code within the jurisdiction of *Any Magistrate.*

2. It remains therefore to be considered whether the general provisions of the Code of Criminal Procedure enable a Subordinate Magistrate to take cognizance of this offence when committed against his own Court, and the solution of this question

* Cancels Para. 2 of Proceedings of High Court, dated 18th May 1869.

(a) See 4 Madras High Court Reports, Rulings, page li.

depends entirely upon the construction of Section 171 read with Sections 172 to 175 of the Code. 1869. July 26.

3. The words of Section 171 are simply enabling—*May send*,—and there is nothing in the Section to warrant a belief that the Legislature intended them to be imperative. Sections 172 to 175 do not bear against a literal construction of Section 171, for they simply give an express jurisdiction to Courts of Session and Civil Courts to deal with offences committed against the authority of those Courts,—a jurisdiction which without these Sections they would not have had.

Then in Section 176 there is an express provision for the transfer of charges from the Magistrate before whom the offence was committed and there *Shall* is used. The provision seems to shew forcibly that the words in Section 171 were meant to be permissive, for it impliedly recognizes that the Magistrate before whom the offence was committed might have investigated the charge if he had jurisdiction over it.

4. The High Court are of opinion that, in the case referred by the Magistrate, the Subordinate Magistrate, having jurisdiction over the offence under Act VIII of 1866, did not act irregularly.

Appellate Side.

Proceedings, 1st July 1869.

UPON reading a letter dated the 12th June 1869 from the Magistrate of South Arcot, referring for the orders of the High Court, under Section 434 of the Code of Criminal Procedure, the Proceedings of the 1st Class Subordinate Magistrate of Tindevanum in Case No. 115 of 1869, as contrary to law, 1869. July 1.

The High Court passed the following

Being in possession of salt-earth from which salt may be manufactured with the object of making salt is an offence under the Salt laws.

RULING:—In this case the Subordinate Magistrate convicted three persons under Act XVII of 1840 for being in possession of salt-earth for the purpose of illicit manufacture of salt. The Magistrate, concurring with his Head Assistant, referred the case on the ground that the being in possession of salt-earth from which salt may be manufactured is not an offence under the Salt laws.

The High Court are of opinion that there is no ground for their interference. They observe that the being in possession of a large quantity of salt-earth would in itself be a presumption that

1869. July 1. the party in possession was "engaging in a clandestine and fraudulent transaction with respect to making salt in an illicit manner" (*Section* 18, *Regulation* I of 1805), it being notorious that salt is largely manufactured by lixiviation from this salt-earth and smuggled into the market to the detriment of the Government monopoly. But in the present case there is further the admission of the defendants that they had gathered and were taking home the earth with the object of making salt.

There are two errors in the sentence of the Subordinate Magistrate which require notice. In the first place he should have quoted Madras Act III of 1865 which gives him power to act under Act XVII of 1840, and in the second place, if he awards a sentence of fine under Act XVII of 1840, he has no power to commute it to imprisonment, though Act VII of 1852, under which the Subordinate Magistrate also has jurisdiction, does give that power.

Appellate Side.

Proceedings, 7th July 1869.

1869. July 7. UPON reading a letter, dated the 9th June 1869, from the Magistrate of Bellary, referring for the opinion of the High Court the question whether Section 1, Madras Act III of 1865, renders inoperative the proviso in Section 50, Act XXIV of 1859,

The High Court made the following

By Madras Act III of 1865 a Native Deputy Magistrate has power to try Police Officers above the rank of a Private charged with offences under the Madras General Police Act (XXIV of 1859) notwithstanding the proviso in Section 50 of the latter enactment.

RULING:—The native Deputy Magistrate and the Magistrate are at issue on the above point, the former holding that he has jurisdiction to try Police Officers above the rank of a Private charged with offences under the Madras General Police Act (No. XXIV of 1859), the latter that the proviso in Section 50 of that enactment is still in force, notwithstanding Madras Act III of 1865.

2. The High Court observe that Madras Act III of 1865 operates to give every Magistrate within the Presidency cognizance of any offence committed against any special or local law then in force in the said Presidency, notwithstanding any provision to the contrary in any Act or Regulation then existing, with the proviso

that every such Magistrate should be restrained within the limits of his ordinary jurisdiction as to the amount of punishment he may inflict. It was held in the proceedings of the High Court dated 2nd April 1868 that this applied to offences punishable under Act XVIII of 1854 (an Act relating to Railways in India,) and in the opinion of the High Court the Madras Act is equally operative as regards charges under the Madras General Police Act against Police Officers above the rank of Private, which were by Section 50 of that Act exempted from the jurisdiction of Magistrates who are not "Europeans." The question referred by the Magistrate must therefore be answered in the affirmative.

1869.
July 7.

Appellate Side.

Proceedings, 13th July 1869.

1869.
July 13.

THE Calendar in Case No. 18 of 1869 on the file of the Session Court of Bellary showed that one Gowdar Kottra was charged with having committed adultery with one Bhurunee, under Section 497 of the Penal Code. It appearing that the husband who had instituted the prosecution had died before the trial, the Session Judge directed the Public Prosecutor to withdraw the charge, and, the Assessors finding a verdict of not guilty, the prisoner was discharged.

The High Court passed the following

The death of the husband does not necessarily put an end to a prosecution for adultery under Section 497 of the Penal Code.

RULING:—The High Court observe that the law only requires that the prosecution should be *instituted* by the husband. It is no doubt desirable that such charges should be withdrawn by the prosecution on the death of the aggrieved party, but it cannot be said that the death necessarily puts an end to the prosecution.

Appellate Side.

Proceedings, (a) 22nd July 1869.

1869. *July* 22.

THE High Court made the following

RULING :—On more than one occasion the Judges have had occasion to remark on the great laxity displayed by some of the Judges in recording judgments in appeal suits. The provisions of Section 359 of the Civil Procedure Code have been in several instances almost entirely disregarded and a short sentence expressing the Appellate Court's concurrence with the judgment of the Lower Court has formed the only record of the decision of the Appellate Court. Now, although it is not so necessary to enter fully into the reasons for confirming as it is for reversing or modifying the decree of the Lower Court, still the High Court must require Appellate Judges in every case to act so far in conformity with the provisions of the Code of Civil Procedure as is sufficient to shew that the Court has dealt with each ground of appeal, and more especially to record distinct findings on questions of *fact*, as the conclusions of the Lower Appellate Courts are final in this respect and binding on the High Court in special appeal.

It is the duty of Appellate Judges to act so far in conformity with the provisions of the Code of Civil Procedure as is sufficient to show that the Court has dealt with each ground of appeal, and more especially to record distinct findings on questions of fact.

(a) Note.—The following decision in Special Appeal on the subject of the above ruling is inserted here.

Appellate Jurisdiction (a)

Special Appeal No. 41 *of* 1869.

Kristna Reddy and 3 others...... *Special Appellants, (Defts.)*

Strinivasa Reddy............... ... *Special Respondent, (Pltff.)*

Where the Civil Judge, confirming a decree of the District Munsif, stated by way of a Judgment that he was of opinion that the decision of the Munsif was fair and equitable, the High Court, on Special Appeal, sent back the case with directions to the Civil Judge to record a Judgment in substantial conformity with the provisions of the Code of Civil Procedure.

This was a Special Appeal against the decision of W. Hodgson, the Acting Civil Judge of Cuddalore, in Regular Appeal No. 58 of 1867, confirming the decree of the Court of the District Munsif of Villipuram in Original Suit No. 995 of 1864.

(a) Present: Scotland, C. J., and Innes, J.

Handley, for the Special Appellants, the Defendants. 1869.

Savundranayagum Pillay, for the Special Respondent, the Plaintiff. *July 5.* *S. A. No.* 41 *of* 1869.

The Court delivered the following

JUDGMENT:—In this case the Civil Judge has confirmed the Decree of the District Munsif, but by way of a Judgment he merely states that he has perused the whole of the record and that he is of opinion that the decision of the Munsif is fair and equitable. It has been objected by the Counsel for the Special Appellants that they are entitled to have the points for determination set out in the Judgment of the Lower Appellate Court and a decision pronounced thereon together with the reasons for the decision. This Section 359 of the Civil Procedure Code requires, and if there had been anything like a substantial compliance with the provision, we should not have felt it necessary to send the case back, but what purports to be a judgment is really no judgment at all. Nine issues were framed by the District Munsif for trial and he recorded his opinion at length on four of these issues. In the Appeal Petition to the Civil Court the 1st, 2nd, 3rd, and 4th Defendants took exception to the Munsif's findings on every point, but the Judge contents himself with saying that the decision appealed against is fair and equitable. This amounts to an error of procedure which calls for our interference.

It is accordingly ordered that the suit be remanded to the Lower Appellate Court, and the Civil Judge be directed to record a judgment in substantial conformity with the provisions of the Code of Civil Procedure and return it to this Court within two weeks from the date of receiving this order.

Appellate Side.

Proceedings, 26th July 1869.

UPON reading a letter, dated 6th April 1869, from the Acting Session Judge of Cuddalore, submitting copy of the Proceedings of the Session Court, dated 2nd April 1869, passed on Criminal Miscellaneous Petition No. 15 of 1869, and requesting an authoritative ruling on the question of granting unauthenticated copies of the records of a Criminal case to parties desirous of appealing, and also a letter dated 4th May 1869 from the same 1869. *July 26.*

1869. July 26. Officer, forwarding a communication from the Joint Magistrate of South Arcot on the same subject,

The High Court made the following

RULING :—In the circular Proceedings of the late Sadr Court, dated 21st March 1860, containing revised rules relating to copies, it was held that the parties to any Criminal proceeding were entitled to obtain on application copies of any order, sentence, document, deposition, or other record connected therewith, not being in its nature extra-judicial, on plain or stamp paper, at the option of the applicant, but that authenticated copies would only be granted on stamp paper except in the case of Criminal sentences.

With the exception of the depositions of the witnesses, and the documentary evidence and copies of final sentences or orders passed by Criminal Courts which parties desirous of appealing from such sentence are required by Section 416 of the Code of Criminal Procedure to file with their petition of appeal, when the party who is desirous of appealing is in confinement under the operation of the sentence or order at the time that he applies for a copy of the same, copies of any part of the record of a Criminal trial can only be furnished to applicants on Stamp paper.

In their Proceedings of 25th September 1862, the High Court, after considering the provisions of the Stamp Act (X of 1862), held that copies of depositions which a Magistrate is required by Section 230 of the Code of Criminal Procedure to furnish to an accused person, and copies of final sentences or orders furnished under Section 440 of the Code of Criminal Procedure, might be given on plain paper but must be authenticated by the presiding Judge or Magistrate. They further held that no authenticated copies of any other portion of the record of a Criminal trial could be furnished except on stamp paper, but unauthenticated copies for private use might be furnished on plain paper.

On the 8th January 1863, the Governor General of India in Council, under the powers vested in him by Section 33, Act X of 1862, (for which Section 2, Act XVIII of 1865 was afterwards substituted), issued the following Notification :—

" Under the provisions of Section XXXIII of Act X of 1862, " the Governor General in Council is pleased to exempt from " Stamp duty copies of final sentences or orders passed by Crimi- " nal Courts which parties desirous of appealing from such sen- " tences or orders are required by Section 416 of the Code of " Criminal Procedure to file with their petition of appeal, provided " that the party who is desirous of appealing is in confinement

"under the operation of the sentence or order at the time that "he applies for a copy of the same." 1869. *July 26.*

On 3rd March 1863, the High Court held that this Notification did not in any way affect the ruling contained in the Proceedings of 25th September 1862.

The question now raised is whether the rules regarding unauthenticated copies of the record on plain paper are still in force.

2. On a full consideration of the law relating to stamps, it appears to the High Court that the order contained in the Proceedings dated 25th September 1862, to the effect that no authenticated copies of any part of the record except depositions under Section 230 and orders or sentences under Section 440 of the Code of Criminal Procedure can be furnished except on stamp paper, but that unauthenticated copies of any part of the record may be furnished on plain paper for private use, is erroneous.

Neither Schedule B of Act X of 1862, nor Schedule B of Act XXVI of 1867, recognize any distinction between authenticated and unauthenticated copies, and the usage of granting unauthenticated copies on plain paper is consequently not warranted by the law.

Such copies as the law requires to be on stamp paper must in future be granted only on stamp paper.

3. But there appear to be erroneous impressions abroad as to the construction of Article 5 of Schedule B of Act XXVI of 1867, which it is important to remove.

Article 5 of Schedule B of Act XXVI of 1867 is the only Article of the Stamp Act which can be supposed to impose a Stamp duty on copies of depositions, &c., in a Criminal trial, and, in the opinion of the High Court the words *Judicial Proceeding* were intended to refer only to writings in the nature of an opinion, determination or proceeding recorded by the Court in the hearing of a case, and cannot include depositions of witnesses or other documents which form part of the evidence at the trial. Nor can the words which follow, viz., *Account, Statement, Report or the like*, be held except by a strained interpretation to include either. It is reasonable to presume that depositions would have been expressly mentioned had the Legislature intended the provisions of the Stamp Act to apply to them.

4. The High Court are therefore of opinion that, with the exception of the depositions of the witnesses and the documen-

1869. July 26. tary evidence and of final sentences or orders in the cases falling within the Governor-General's Notification of 8th January 1863, copies of any part of the record of a Criminal trial whether authenticated or unauthenticated can only be furnished to applicants on stamp paper. Section 440 of the Code of Criminal Procedure does not appear to them to have any bearing on the question of Stamp duty but to refer solely to the expense of copying. Copies applied for under that Section should in all cases be written by a salaried officer of the Court.

5. The High Court have on more than one occasion remarked gross errors and omissions in unauthenticated copies furnished to parties, and they have considered the propriety of requiring every copy furnished by a Court to be authenticated, but, in consideration of the additional labor the duty of authenticating copies would impose, they forbear from making a rule to this effect. At the same time they must require that as much care as possible be taken to ensure better results from the Copyists.

6. Parties to any Criminal proceeding will be entitled to apply for authenticated or unauthenticated copies of depositions, &c., at their option,—the only difference being that in the former case the regulated charge for examining must be deposited in addition to the regulated charge for copying. The charges for copying are—

For authenticated copies 1 pie per line.

For unauthenticated copies 1 pie per two lines :

And the charge for examining authenticated copies 1 pie per four lines.

Copies of documents which the law requires to be on stamp paper, copies of orders which fall within the exemption of the Governor General's Notification, and copies which the law requires Courts to furnish to parties, must in all cases be authenticated.

Appellate Side.

Proceedings, 26th July 1869.

1869. *July* 26. UPON reading a letter, dated 29th June 1869, from the Magistrate of South Arcot, requesting to be informed whether if a Subordinate Magistrate acting without jurisdiction discharges an accused person or dismisses a complaint without enquiry the

Magistrate of the District has or has not authority under Clause 2, Section 435 of the amended Code of Criminal Procedure to annul such order of discharge or dismissal and direct at his option either a new trial before himself or the committal of the case to the Court of Session, 1869. *July* 26.

The High Court passed the following

Where a Subordinate Magistrate of the 1st Class acting without jurisdiction held a trial and acquitted the accused person under Section 255 of the Code of Criminal Procedure: held that the High Court alone could set aside the finding under Section 404 and that the Magistrate of the District had no power to do so under Section 435 of the Code as amended by Act VIII of 1869.

RULING:—The Magistrate has submitted a question as to the construction of Section 435 of Act XXV of 1861 as amended by Act VIII of 1869. Clause 2 of that Section gives the Magistrate jurisdiction to order the commitment of any accused person discharged by a Subordinate Magistrate under Section 225 or Section 250 and to order an enquiry into any complaint dismissed by a Subordinate Magistrate under Section 67 or Section 180.

2. The case now before the Magistrate of South Arcot is different from either of the above cases, and Section 435 is therefore inapplicable. Here a Subordinate Magistrate of the 1st Class acting without jurisdiction has held a trial and acquitted the accused person under Section 255.

The High Court alone under Section 404 can set aside the finding of the Subordinate Magistrate and the record of the case should now be sent for under Section 434 for the consideration of the High Court.

Appellate Side.

Proceedings, 26th July 1869.

UPON reading a letter, dated the 17th June 1869, from the Magistrate of South Arcot, referring for the orders of the High Court, under Section 434 of the Code of Criminal Procedure, the Proceedings of the 1st Class Sub-Magistrate of Tindevanam in Cases Nos. 94, 95, 96, 97 and 101 of 1869, as contrary to law, 1869. *July* 26.

1869.
July 26.

The High Court made the following

RULING:—In these cases the Subordinate Magistrate convicted the accused under Section 17 of Act IX of 1868 for omitting to take out certificates. The Subordinate Magistrate was himself the Collector who caused the notices to be served.

Where it is sought to recover the penalty described in Sec. 17 of Act IX of 1868 from any person who omits to take out a certificate the Collector who issued the notice should prefer a complaint before a Magistrate, and the Collector cannot prefer the complaint before himself in his capacity of Magistrate.

The Head Assistant Magistrate referred the cases on the grounds (1) that there was no evidence of the offences alleged to have been committed, (2) that the Subordinate Magistrate had no jurisdiction as no complaints were preferred, (3) that the trials were held under Chapter XV of the Code and the accused examined contrary to the provisions of that Chapter. He further submitted his opinion that the Collector who issued the notice could not as Magistrate take cognizance of the offence described in Section 17 Act IX of 1868.

3. The High Court are of opinion that if it is sought to recover the penalty described in Section 17 of Act IX of 1868, from any person who omits to take out a certificate, the Collector who issued the notice should prefer a complaint before a Magistrate, and it could not have been intended that the Collector should prefer the complaint before himself in his capacity of Magistrate. On this ground the proceedings of the Subordinate Magistrate must be quashed as illegal. So much of the fines as was recovered as a penalty beyond the amount required to be paid for the certificates should now be refunded.

Appellate Side.

Proceedings, 30th July 1869.

1869.
July 30.

UPON reading Proceedings of the Session Court of Calicut, dated the 17th July 1869, reviewing the Proceedings in Calendar Case No. 38 of 1869, on the file of the Assistant Magistrate of Malabar,

The High Court made the following

RULING:—The High Court are of opinion that the Session Judge is correct in his opinion that an arrest under Civil process of a Mofussil Court on a Sunday is in this country perfectly legal.

Arrest under Civil process of a Mofussil Court on Sunday is legal in this country.

Service of process on a Sunday was made illegal in England by an express enactment, and there is no similar enactment in force in the Mofussil. 1869. *July* 30.

Appellate Side.

Proceedings, 6th August 1869.

UPON reading again Calendar in Case No. 35 of 1869 on the file of the Session Court of Chingleput, and also the amended Calendar in the above case submitted in accordance with the High Court's Proceedings, dated 30th July 1869, No. 1398, 1869. *August* 6.

The High Court made the following

Upon a prosecution under Section 318 of the Penal Code a person cannot be convicted of concealing the birth of a child in the case of a mere fœtus four months old.

RULING:—It now appears that the prisoner was not guilty of the offence charged:—in the former Calendar it was merely stated that the child was born prematurely. It now appears that it was not a child at all but a mere fœtus 4 months old. In *Reg. v. Berriman* cited in 1 *Russell* 779 (last edition) it was held by *Erle, J.* that the offence cannot be committed unless the child had arrived at that stage of maturity at the time of birth that it might have been a living child, and that the law does not compel a woman to proclaim her own want of chastity, and that if she miscarried when the fœtus was but a few months old and had no chance of life she cannot be convicted of the charge of concealing the birth of a child. It appears to the High Court that this applies as much to a charge under Section 318, Penal Code, as to a charge under the corresponding English Statute. There is nothing in the case to show that the prisoner caused herself to miscarry. As the whole of the record at the trial is before them the High Court can at once proceed under Section 405, Criminal Procedure Code. The sentence of the Court of Session in Calendar No. 35 of 1869, must be reversed as contrary to law.

Appellate Side.

Proceedings, 9th August 1869.

1869.
August 9.

UPON a reference from the Magistrate of Bellary, requesting the opinion of the High Court on a question raised by the Acting Head Assistant Magistrate "whether the provisions of Madras Act III of 1865 operate so far as to nullify the powers vested in the Local Government by Section 5, Act XIII of 1859, and to enable Magistrates other than those authorized by Government under the Section quoted to entertain and dispose of cases of Criminal breach of contract under that enactment,"

The High Court made the following

Madras Act III of 1865 authorizes every Magistrate to take cognizance of offences against Act XIII of 1859.

RULING.—In the opinion of the High Court there can be no question that Act XIII of 1859 is a special law, and that in that respect Madras Act III of 1865 applies to it. Section 5 of Act XIII of 1859 restricts the exercise of jurisdiction under the Act to such Officers as shall be specially appointed by Government. Then Madras Act III of 1865 authorizes every Magistrate to take cognizance of any offence against any special or local law now in force in the said Presidency, notwithstanding any provision to the contrary in any Act or Regulation now existing, and *inter alia* offences under act XIII of 1859.

2. The jurisdiction of any Magistrate is, however, subject to the proviso that as to the amount of punishment he shall be restrained within the limits of his ordinary jurisdiction. What is the ordinary jurisdiction of a Magistrate as respects the kind of punishment which he is authorized to inflict is clear from Section 22 of the Code of Criminal Procedure. Imprisonment and fine may be imposed within certain limits, and therefore any offence under a special or local law punishable with imprisonment or fine is cognizable by them. Not so a sentence of whipping, for that is not within the ordinary jurisdiction of a Magistrate. Nor can Act III of 1865 give jurisdiction under Act VI of 1864. This disposes of the Acting Head Assistant Magistrate's objection.

Appellate Side.

Proceedings, 10th August 1869.

1869. *August* 10.

UPON reading a letter, dated the 20th May 1869, from the Acting Magistrate of Tinnevelly, referring at the request of the joint Magistrate for the orders of the High Court, under Section 434 of the Code of Criminal Procedure, the Proceedings of the 2nd Class Sub-Magistrate of Tencasy in Case Nos. 13 and 14 of 1869, as contrary to law, and also a letter, dated the 20th July 1869, from the same Officer, forwarding the records in the above cases in accordance with the Proceedings of the High Court, dated 26th May 1869,

The High Court passed the following

Where the defendants, ryots of portion of a Zemindary sold in execution of a decree of the Civil Court, reaped and carried away their crops despite the purchaser's people, and refused to allow the purchaser's people to seal and mark grain which had been reaped, and the ryots were assembled in such numbers and so armed that nothing could be done against them. Held by the High Court that the acts of the defendants did not amount to an offence under Section 141 of the Penal Code.

RULING :—From a perusal of the records of these cases it appears that a portion of a Zemindary has been sold under a decree of the Civil Court. The ryots decline to recognize the purchaser and adhere to the Zemindar's family. In one of the two cases referred, the ryots (Defendants) reaped and carried away their crops despite the purchaser's people. In the other, the crop had been reaped and heaped, but the ryots, the Defendants, refused to allow the purchaser's people to seal and mark the heaps and carried away their grain. In both cases it must be taken as found by the Subordinate Magistrate that the Defendants were in such numbers and so armed that nothing could be done against them.

The Subordinate Magistrate convicted the Defendants in both cases under Section 147, Penal Code, of rioting.

2. The High Court are of opinion that the acts of the Defendants did not fall within either Clause 3, 4 or 5 of Section 141. The common purpose was not to commit any offence, such for instance as under Section 424, Penal Code, for apparently there was a *bonâ fide* claim of right, and the out-turn of the crop having been openly ascertained, the purchaser can be put to no loss or

1869. *August* 10. difficulty in recovering the amount that may be due to him upon the share of the crop to which he may hereafter be found entitled under his purchase. So that there is no ground for saying that the crop was carried away with any intent to defraud. Further, the Defendants were in possession of the crops and grain which were the property of them or of some of them, and if any one was seeking to enforce a right or a supposed right, it was the purchaser and his agents, and what the Defendants did was, by show of force, to protect their own possession and prevent the purchaser from enforcing his supposed right.

3. Being of opinion that no offence has been committed and that the purchaser of the Zemindary is bound to resort to his legal remedy for recovery of his rents, the High Court quash the convictions and sentences in Calendar Cases Nos. 13 and 14 of 1869 on the file of the Subordinate Magistrate of Tencasy, and direct that the fines levied be refunded.

Appellate Side.

Proceedings, 12th August 1869.

1869. *August* 12. UPON reading a letter, dated the 19th July 1869, No. 44, from the Officiating Session Judge of Calicut, referring for the orders of the High Court, under Section 434 of the Code of Criminal Procedure, the Proceedings of the Deputy Magistrate of South Malabar in Case No. 69 of 1869, as contrary to law, and also a letter, dated the 2nd August 1869, from the same Officer forwarding the record in the above case in accordance with the Proceedings of the High Court, dated 26th July 1869,

The High Court passed the following

Where a Magistrate convicts a person of an offence he is bound to pass some sentence.

RULING :—The Deputy Magistrate's finding and sentence are recorded as follows :—

"The Deputy Magistrate, after "taking the evidence, is of opinion that "the hardship the accused has been subjected to is a sufficient "punishment and therefore directs that he be released with a "warning."

The Officiating Session Judge refers the case on the ground that the finding is one of conviction, and that the omission to record a sentence is illegal.

2. The High Court are of opinion that in the present case it will be sufficient to point out to the Deputy Magistrate that his finding should have been recorded in the form prescribed by the Code of Criminal Procedure, and that having convicted the prisoner he was bound to pass some sentence, if only a nominal one. 1869. *August* 12.

Appellate Side.

Proceedings, 16*th August* 1869.

UPON a reference from the Magistrate of South Arcot, referring for the orders of the High Court, under Section 434 of the Code of Criminal Procedure, the Proceedings of the 1st Class Sub-Magistrate of Cuddalore, as contrary to law, 1869. *August* 16.

The High Court made the following

An order issued by a Magistrate under Sec. 62 of the Code of Criminal Procedure, in consequence of a Mahazirnama signed by certain persons, but without any notice to the defendant or enquiry by the Magistrate, is illegal.

RULING:—In consequence of a Mahazirnama presented by certain inhabitants of Cuddalore, the Sub-Magistrate issued an order under Section 62 of the Code of Criminal Procedure to one Gopaloo Naick directing him not to allow his house to be used for gambling purposes. The Magistrate records his opinion that the order was illegal on the ground that no enquiry was held before issuing the order.

2. The High Court concur with the Magistrate that the order having been made without any notice to the party defendant or any enquiry whatever is sufficient to vitiate the Sub-Magistrate's proceedings, and that the order must be set aside.

Appellate Side.

Proceedings, 17*th August* 1869.

UPON a reference from the Judicial Commissioner of Ootacamund, referring for the orders of the High Court, under Section 434 of the Code of Criminal Procedure, the Proceedings of the Joint Magistrate of Wellington, in Case No. 101 of 1869, as contrary to law, 1869. *August* 17.

1869. August 17.

The High Court made the following

An order directing compensation under Act XIII of 1859 is illegal.

Such portion of the money advanced to the defendant as has been appropriated to the fulfilment of the contract or as could justly be set off against a part fulfilment of the contract ought not to be ordered to be refunded.

RULING:—In this case the accused contracted with the complainant to supply a certain quantity of timber within one month in consideration of receiving an advance of 100 Rupees. Having supplied a portion of the timber, the accused made default. He was then charged under Act XIII of 1859, and the Magistrate awarded to the complainant the amount claimed by him, viz., Rupees 100-12-0 by way of compensation.

2. The High Court agree with the Judicial Commissioner that any order for payment of compensation under Act XIII of 1859 is illegal. In the terms of Section 2 there is no provision as to what is to be done in case the contract has been partly performed and partly not performed. It appears to be left to the discretion of the Magistrate to say whether it is "just and proper" that the whole sum advanced or any and what part thereof ought to be repaid. In the present case, the accused having received 100 Rupees advance, it was competent to the Magistrate to direct the refund of that amount, and the order is only illegal as regards 12 Annas.

3. But the High Court are clearly of opinion that such portion of the money advanced as has been appropriated to the fulfilment of the contract or as could justly be set off against a part fulfilment of the contract ought not to be ordered to be refunded.

4. The order of the Magistrate awarding Rs. 100-12-0 as compensation must now be set aside, and he must be directed to decide whether in the circumstances of the case any and what part of the sum advanced ought to be repaid.

Appellate Side.

Proceedings, 20th August 1869.

1869. August 20.

UPON reading the Proceedings of the Session Court of Nundial, dated the 13th July 1869, reviewing the proceedings of the Deputy Magistrate of Peapally, dated 19th May 1869,

The High Court made the following

1869. *August* 20.

RULING :—The Session Judge observes "Section 294 makes no provision for the sureties being imprisoned. It says that the penalty may be recovered from them in the same manner as from the principal party, but it does not say that if it cannot be recovered, they will be, like him, liable to imprisonment."

Section 294 of the Code of Criminal Procedure does not authorise the imprisonment of sureties.

2. The High Court are of opinion that this is a correct exposition of the law, as contained in Section 294 of the Code of Criminal Procedure.

Appellate Side.

Proceedings, 24th August 1869.

UPON reading a letter, dated the 23rd July 1869, from the Session Judge of Berhampore, referring for the orders of the High Court certain correspondence between himself and the District Magistrate of Ganjam relative to the trial of convicts in chains,

1869. *August* 24.

The High Court passed the following

RULING :—A convict from the Berhampore Jail under sentence of 6 months' imprisonment was brought up in chains to stand his trial on charges of house-breaking and causing grievous hurt at the June Sessions. The Session Judge refused to try him unless the fetters were removed.

A Judge should not refuse to try a prisoner brought up in chains to stand his trial, but the Judge may direct the removal of the fetters unless satisfied by a representation from the proper officer that they are necessary.

2. The High Court are of opinion that as a general rule a convict should be relieved of his chains when brought before a Court for trial or as a witness. There can be no doubt that the display of fetters must have a prejudicial effect against him in the eyes of Jurors or of Assessors. The exception to this rule should be when the Superintendent or Keeper of the Jail certifies that the use of chains is necessary to guard against violence or an attempt to escape.

3. In the present case the High Court are of opinion that the Judge should not have refused to try the prisoner though he might have directed the removal of the fetters unless satisfied by a representation from the proper officer that they were necessary.

1869. August 24. 4. A copy of these Proceedings will be transmitted to the Right Honorable the Governor in Council with a view to a Rule being framed for the guidance of the Criminal Courts in similar cases should the Government think fit.

Appellate Side.

Proceedings, 26th August 1869.

1869. August 26. UPON reading a letter, dated 18th June 1869, from the Session Judge of Vizagapatam, referring for confirmation of the sentence of death the proceedings in Calendar Case No. 15 of 1869 on the file of his Court,

The High Court made the following

The High Court as a Court of revision has jurisdiction to set aside a finding of acquittal by a Session Court by virtue of Section 405 of the Code of Criminal Procedure.

RULING :—In this case the prisoner was tried on a charge of murder and acquitted by the Session Court on the ground that it was impossible to convict when the only direct evidence was recorded without the sanction of solemn affirmation. The evidence referred to was that of two boys aged about 12 years, who were not simply affirmed under Section 15, Act II of 1855, but were, as the Judge puts it, "admonished to speak the truth." On a review of the Calendar, the High Court called for the depositions of the witnesses abovementioned pointing out to the Session Judge that if the witnesses had not been simply affirmed, there was a material error of law, and it afterwards appearing that there was this irregularity at the trial, quashed the proceedings and directed a new trial. At the second trial the prisoner was again indicted on a charge of murder, and convicted and sentenced to death subject to the confirmation of the High Court.

2. As this is the first occasion on which the question of the jurisdiction of the High Court as a Court of revision to set aside a finding of acquittal has arisen in this Presidency, the point was referred to a full Court and after a careful consideration of the whole question, the Court are unanimously of opinion that the word "order" in Section 405 of the Criminal Procedure Code must be held to include an order of discharge.

3. They base their decision on the following grounds:— Every judgment of acquittal concludes with a formal order of discharge and the finding and the judgment are required to be re-

corded in one proceeding in the same way as the finding of guilty and the sentence are recorded in one proceeding. Then the power given by Section 405 to pass such judgment sentence or order as the Court should think right or to order a new trial indicates that every final order passed in a Criminal trial was meant. Section 426 applies only to cases in which a conviction has taken place. If it were otherwise, the general provisions in Section 439 would be rendered unnecessary.

1869. *August 26.*

4. It is only necessary to observe that in quashing the proceedings, Section 405 not Section 403 should have been quoted as the Section which gave the High Court jurisdiction. The latter Section (403) appears to be limited to trials in which there has been a conviction. The former Section 405 enables the Court to enquire into " the regularity of the proceedings of the Court" below, and here there certainly was irregularity at the first trial in the manner in which the statements of the 1st and 2nd witnesses were received and clearly an order of discharge may be " contrary to law" as where all the facts constituting an offence are found, and the Court mistaking the law holds that they do not suffice to make out the offence and discharges the prisoner. Lastly, one of the remedies which the High Court may apply under Section 405 is expressly to order a new trial, and where there has been substantial irregularity in the proceedings of the Lower Court, this is clearly the appropriate remedy. Upon the whole, the High Court are of opinion that the words " sentence or order" in Section 405 are wide enough to include an order of discharge and justify the course taken in the present case by this Court.

5. Such being the conclusion at which the High Court have arrived and there being no doubt whatever upon the evidence as to the prisoner's guilt, the sentence of death has been confirmed.

6. It is satisfactory to note that the present decision is in accordance with the judgment of the High Court of Calcutta in the case of *Govachund Gopee*, reported in 5 *Weekly Reporter*, 45 (*Criminal Rulings.*)

GLOSSARIAL INDEX.

	Page.
Aagdut Nunjah	289
Aliyasantâna, Karn. Succession or descent by the female line in Malabar	263
Ali Uli	30
Arudicaray, a tenure under which land is held in the Tamil Provinces	288
Atchandrarkam	157,159
Dási	208
Datta homam, S. a ceremony performed at the adoption of a son	166
Dévasthánam.—Revenue applied to the support of a temple	3
Dharmakarta—The Manager of a temple	63,410
Gosha, one sitting in a corner, hidden	App. xv
Grihi, an unmarried man	272
Guddee Nisheen	25
Guli, a measure of land	374
Hibbanáma. A deed of gift	115
Hibeb-bil-Iwaz; H. A. mutual gift	116
Jamábandi, H., Settlement of revenue	324
Jenm (Jumna), Mal., the hereditary or proprietary occupancy of land	360
Kadappu, Tam., A kind of rice that is reaped from September to November	334
Kalam, Tam., A measure equal to 12 mercals	470
Karai	286
Karanikam, Tel, the office of an Accountant	337
Kareiyidu	157,159
Karar, H., An agreement	387,389
Kaval	115
Kudiváram, Tam. The share of the produce which is the right of the inhabitants or of the cultivators	321
Kurukam, Tam., A land measure	470
Lopayakári, An under renter or tenant	337
Lopayakáribhastulu	336
Mahanam	159
Maw, the one-twentieth of a véli	374
Melwaram. Tam. Mal. The proportion of the crop claimed by Government	302,321
Mírás, H., hereditary right	157,158
Mírásidár	157,158
Motha faisal	160
Mutawallee	25,47
Muttah	297,298,397
Nanal Kulam	286
Nerick, tariff	324
Olungu	159
Palabhogam. Tam. Enjoyment, possession	288
Palle, Tam. A village	336
Pangali. Tam. A sharer	287
Pangaval, Tam. A village held in common by a certain number of co-parceners	286
Pangu, Tam. A share	308
Pasangcari, Tam	287
Pathakam	159
Pattapatti	31
Payacarrie, Tel. A temporary cultivator	430
Punacolam nunjah	289
Punakulam, Tam. Land fit for gardens or plantations	286
Sagotra	210,214
Samudayam	286
Saradayam, S.	287
Sumbá, any rice crop reaped between January and July	334
Sakhavasi. Tam. One who lives at his ease	432
Swamibhogam, Tam. The landlord's share of the produce	321
Thanaputhu	286
Ulcudy	291
Urisiri	30
Vara, Tam. A share of the produce of a field	398
Varapot	159
Véli, Tam. A measure of land containing 5 cawnies, or 6 acres and $\frac{1}{6}$	374
Wakufnama	45
Yejaman	31,264,388

INDEX OF AUTHORS, JURISPRUDENTS AND TEXT BOOKS.

	Page.
A. Houston	209
Atri	272
Baillie, *Digest*	116
„ *Mahomedan Law of Sale*	117
„ *Land Tax of India*	157
Bhutala Pandiya	201
Cannaka	166,272
Colebrooke, *Essay on the Religious Ceremonies of Hindus*	341
„ *Digest*	85,193,211,215
Chitty, *Contracts*	451
Colquhoun, *Roman Civil Law*	195,342
Cullucabhatta	208
Dattaka Chandrica	166,208,236,272
Dattaka Mimansa	166,208,236,272,274
Daya Bhaga	215,236,237,311
Digest	
Doorub Muktar	4
Dayakrama Sangraha	208
Elberling	86,209,238
Elphinstone, Montstuart	110
Futamee Aulumgeree	48
Hamilton, *Hidaya*	47,116
Houston, A	209
Hyde East, Sir E. *Notes of Cases*	238
Jagannatha, *Digest*	166,271,344
Jagannatha Tharka Panchanana	208,210
Jimuta Vahana	209
Justinian	191,195
MacNaghten	25,47,48
„ „ *Principles and Precedents*	116,117,118,169,271
„ „ W. H.	209
MacNaghten, Sir F. *Considerations on Hindu Law*	349
Maine, *Ancient Law*	110,111
Manu	86,208,212,235,236,272,273, 310,342,344,376
Mitakshara	208,209,212,273,309, 376
Morley, *Digest*	117
Narada	237
Nirnavasindhu	169,172
Phillimore	179,225
Sadagopah Charlu, *Manual*	25
Smriti Chandrika	86,210,215,310
Spence, *Chancery*	87
Story, *Conflict of Laws*	17,179,225
Strange, *Manual of Hindu Law*	200,202,273
Strange, Sir T. *Hindu Law*	167 191,237,239,273,311,340,344
Sutherland	166,209,271
Tudor Leading Cases on Mercantile Law	457
Vasishta	166
Vrihaspati	310
Vyasa	309,311
Vyavahara Mayukha	86,208,212 311
Wheaton, *International Law*	17
Yagnavulkya	236,237,310,340,376

INDEX OF CASES CITED.

Page.

Abbakku v. Ammu Shettati 357
Agri Sharma Embrandi v. Vistnu Embrandi 113
Allhusen v. Malgarego 226
Bassapah v. Kooroovatappa 71
Beasley v. D'Arcy 129,136
Bradlaugh v. Derim 367
Buddu Ramaiya v. C.Venkaiya 91
Chedambaram Chetti v. K. Taver 134
Chennapa Nayadu v. Pitchi Reddi 259
Chinna Rany Aiyengar v. Subbraya Mudali 114
Chutary Run Merdun Syu v. Sabub Purlahad Syi 238
Clarke v. Ruthnavalu Chetty 126,135
Cole v. Green 94
Collins v. Blantern 9
Collins v. Godefroy 8
Cookney v. Anderson 224
DeSouza v. Coles 225
Doe d. Janu Beebee v. Abdullah Barbu 25
Drummond v. Drummond 225,226
Duke of Devonshire v. Eglin 100
Elves v. Croft 80
England v. Davidson 8
Exparte Paravartani 23
Fielder v. Ray 134
Franklin v. Miller 125
Foxall v. Barnett 420
Ghulam Husainali v. Zeinal Beebee 117
Gopeemohan Thakur v. Rajah Radhanath 455
Govachund Gopee (Rulings) lxxi
Govinda Pillai v. Chedambara Pillai 357-358
Grimbly v. Aykroyd 335
Hansard v. Hardy 365
Haramohini Chowdhrain v. Dhammani Chowdrain 259
Hewlins v. Shippam 100

Page.

Hitchcock v. Coker 79-80
Holmes v. Penny 87
Hopkins v. Logan 452
Horton v. Mc.Murtry 69
Howcult v. Bonser 392
Hunlock v. Blacklow 78
Imdad Ali v. Kadar Baksh 117
Jackson v. Cator 315
Jeff v. Wood 127
John Young v. Mangala Pillay Ramaya 390
Kamavadhani Venkata Subbaiya v. Joyasa Narasingappa 343
Kennedy v. Brown and wife 248
Kentucky v. Bassford 17
Kesava Pillai v. Peddu Reddi 99
Khadar Saib v. Khader Bibi 429
Kistna Row v. Hachapa Sugapa 390
Kristna Chetti v Balarama Chetty 178
Kunigaratu v. Arrangaden 199,202
Kuppu Aiyar v. Venkataramana Aiyar 259
Lakshmana Naik v. Nanthogopal Naik 259
Layard v. Mand 372,373
Leighton v. Wales 79
Lord Audley's Case. 373
Lutchmee Chund v. Tarwar Mull 225
Maharanee Ram Causi Koeri v. Maharanee Subh Koeri 345
Mallan v. May 79,80
M. J. Yettapa Naikar v. Venkatasubha Yettia 213,214
Nunda Chetti v. Timmaju Hensu 29,200,202
Musnud Ali v. Kursheed Banoo 117
Nagapa Udapa v. Subba Sástri 271
Narayana Aiyan v. Srinivassa Aiyan 259

	Page.
Mudden Mohan Tavari *v.* Kishen Mohan Kundoo	465
Palanivelappa Goundan *v.* Mannaru Naiken	61
Pandaiya Telaver *v.* Puli Telaver	213
Paravartani *Ex-parte*	23
Pemberton *v.* Vaguhan	80
Persand Doss *v.* Deurnautt Dey	391
Pigott *v.* Williams	129, 136
Pudiyaporayil Mamy v. Madakarath Amman Kutti	234
Ramanada Bhutt *v.* Bittu	301
Rawson *v.* Samuel	127,128,135
Referred Case No. 25 of 1863	184
Referred Small Cause Case 36 of 1868.	380,381,382,383,384
Reg. *v.* Aidrus Sáhib	188
Reg. *v.* Berriman (Rulings)	lxiii
Reg. *v.* Bhitto Kuhar	19
Reg. *v* Kumarasamy	21
Reg. *v.* Harris	52
Reg. *v.* Musseemut Zameeru	54
R. A. No. 82 of 1843	29
——— 644 of 1857	267
——— 45 of 1863	236
——— 85 of 1867	114
Ridgway *v.* The Hungerford Market Co.	69
Robert *v.* Croft	373
Ruddravarapu Vissam Raz, Ex-parte	259
Sankappa *v.* Ramayya	86
Sarah Begum *v.* Ghulam Mahomed Khan	116
Seth Sam *v.* Luckpathy Royjee Lallah	437
Sheikh Khyrut Alli *v.* Khuranli Dharee Singh	299
Sutrungun Sutputty *v.* Sabitra Dye	170
S. A. No. 2 of 1825	372
——— 74 of 1851	172
——— 8 of 1854	69
——— 40 of 1858	376
——— 67 of 1858	372
——— 33 of 1860	267
——— 94 of 1861	353
——— 442 of 1861	372
——— 412 of 1862	171
——— 38 of 1863	172
——— 401 of 1863	109
——— 409 of 1863	109
——— 73 of 1868	149
——— 342 of 1868	301
Sreemutty Jaurony Dossee *v.* Srimutty Sabasundry Dossee	171
Striman Sadagopa *v.* Kristna Tatáchariyár	353
Subbarayalu Naick *v.* Rama Reddy	397,398
Swart *v.* Hunt	365
Thompson *v.* Webster	87
Thorpe *v.* Holdsworth	372
Vanquelin *v.* Bonard	179
Venkateswara Yettiapha Naiker *v.* Allagu Muttu Servagaren	397
Veerapermal Pillai *v.* Naraina Pillai	167
Venkopadhyana *v.* Kavari Hengusu	139
Virasami Gramini *v.* Aiyasami Gramini	61
Watson *v.* The Mid-Wales Railway Co.	127,132
Williams *v.* Jones	456
Willis *v.* Peckham	8
Withers *v.* Reynolds	125
Young *v.* The Bank of Bengal	128

AN

INDEX

TO

THE PRINCIPAL MATTERS.

Page.

ABETTOR.

See PENAL CODE (Rulings) lxxxvii

ACCOMPLICE.

See EVIDENCE (Rulings) vii, xxii

ACKNOWLEDGMENT.

The 16th clause of Section 1 of Act XIV of 1859 does not require that the acknowledgment should be given to the mortgagor... 359

An admission or acknowledgment in writing under Section 4 of the Limitation Act (Act XIV of 1859) is sufficient to give a new period of limitation, although a promise to pay on request is not inferrible from it. The word due in the Section means no more than that the debt is owing, and that there is an existing obligation to pay it.

An acknowledgment made in writing to a third party and not to the creditor, is sufficient under the Section.

Quære.—Whether an acknowledgment to satisfy the Section must be made before suit... 386

ACQUITTAL.

The High Court as a Court of revision has jurisdiction to set aside a finding of acquittal by a Session Court by virtue of Section 405 of the Code of Criminal Procedure. (Rulings)... lxx

ACT XXIII OF 1838.

See ATTACHMENT... 277

ACT VII OF 1843.

See JURISDICTION... 227

ACT XIX OF 1843.

See PRIORITY OF CREDITORS... 434

ACT XXIII OF 1854.

See MAGISTRATE (Rulings)... ix

ACT I OF 1858.

See JURISDICTION (Rulings) xxxi

ACT I OF 1859.

See JURISDICTION (Rulings) xxiii

ACT VIII OF 1859.

See CIVIL PROCEDURE CODE.

ACT XIII OF 1859.

See COMPENSATION (Rulings) lxviii

ACT XIV OF 1859.

See LIMITATION.

ACT XXVII OF 1860.

See CERTIFICATE.

ACT XXIII OF 1861.

See CIVIL PROCEDURE CODE.

ACT XXV OF 1861.

See CRIMINAL PROCEDURE CODE.

ACT IV OF 1863 (Madras.)

See JURISDICTION... 149

ACT XX OF 1863.

Act XX of 1863 does not apply to a suit brought by

Page.

the Dhurmukartah of a temple and one of its worshippers to compel the defendant as heir of the late manager to make good out of the property inherited by him the deficiency in the Devastanum funds caused by breach of trust and misappropriation by the late Manager.

The leave of the Civil Court for the institution of such a suit is not necessary, and the suit is maintainable.

The right of instituting such suits is not a privilege accorded by Act XX of 1863, but a pre-existing right... 2

A suit by an Officer of a mosque, temple or religious establishment for dismissal from his office is not a suit for misfeasance within the meaning of Section 14, Act XX of 1863.................. 112

The Committee of a district duly appointed under Act XX of 1863 are entitled to maintain a suit in the Civil Court without having obtained the leave of the Court to bring the suit as well when the object of the suit is to establish their right of control under Section 3 of the Act as when it is sought to enforce such control against the officers of the temple subordinate to them. 404

Semble, that an order of the Civil Court under Section 18 of Act XX of 1863 refusing leave to institute a suit and deciding that the temple was governed by a hereditary durmakurtah, and therefore within Section 3 of the Act, was not conclusive upon the question of title between the parties............................ 410

See COMMITTEE OF DISTRICT... 443

ACT XIII of 1864.

See JURISDICTION (Rulings) iv

ACT XVI OF 1864.

See REGISTRATION..................... 425

Act VIII OF 1865 (Madras.)

See APPEAL 227

See RECOVERY OF RENT.

See REVIEW OF JUDGMENT...... 251

See PUTTAH.

See MUCHILKA.

See LANDLORD AND TENANT.

ACT XI OF 1865.

See JURISDICTION.................. 149

ACT XX of 1866.

See REGISTRATION.

ACT IX of 1868.

See CERTIFICATE (Rulings)... lxii

ADJUSTMENT OF SUIT.

An agreement to take an oath by the parties to a suit filed in Court is not an adjustment by mutual agreement or compromise within the meaning of Section 98 of the Code of Civil Procedure. 422

ADMISSION.

See STAMP............................ 120

See ACKNOWLEDGMENT...... 359,385

ADOPTION.

In order to establish a valid adoption in a Brahmin family, proof of the performance of the datta homam is not essential.

The giving and receiving a boy who is capable of being adopted is sufficient to constitute a valid adoption according to Hindu Law...... 165

A widower can make a valid adoption according to Hindu Law 270

Semble. The Hindu Law does not prohibit an adop-

Page.

tion by a man who has not been married 270

ADULTERY.

See CRIMINAL PROCEDURE CODE (Rulings) lv

ADVOCATE.

Taking it that the rule of English Law, that the relation of Counsel or Advocate and Client creates the mutual incapacity to make a binding contract of hiring and service either express or implied, governs the relation of Advocate and Client generally in this country, there must be the relation of Advocate and Client to give rise to the incapacity, and the incapacity is strictly confined to contracts relating to service as an Advocate in litigation and matters ancillary to such service.

The degree of Barrister is but one of the qualifications for admission and enrolment as an Advocate of the High Court.

Where the defendant, a Barrister, who was not admitted an Advocate of the High Court, or specially authorized to plead in the Session Court, accepted a vakalutnamah from the plaintiff to defend him upon a charge pending in the Session Court, and the defendant failed to appear on the day to which the trial of the plaintiff was adjourned, and the plaintiff sued the defendant to recover the amount of the fee paid,

Held that the suit was maintainable 244

AGREEMENT.

See RENT 320

Page.

An agreement entered into between the plaintiffs and defendants, members of the same caste, contained a stipulation that in the event of the defendants objecting to the receiving of a girl from or the giving a girl to the plaintiffs in marriage, the defendants should be bound to return rupees 500 with interest which the plaintiffs had paid to the defendants under the agreement. It was found by the Civil Judge that the 15th defendant's son was engaged to be married to the 2nd plaintiff's daughter, and that the marriage was broken off on the part of the 15th defendant,

Held, on special appeal, that this was *primâ facie* a breach of the agreement which entitled the plaintiffs to recover, and that it was for the defendants to show that it did not bring them within the terms of the agreement 325

ALIYASANTANA LAW.

The Pattam, or office of dignity in a family governed by the Aliyasantana Law is indivisible, and, whether the family be divided or not, the Pattam, no special arrangement having been made about it, descends to the eldest male of the surviving members of the family.

The passage set out in a note to the case of *Munda Chetti* v. *Timmaju Hensu* (1.M.H. C. Reps. 380) is not a correct interpretation of the original Canarese text of Bhutala Pandiya's work.... ... 28

Page.
See LIMITATION. 137
A female, who is a member of a family governed by the Aliyasantana system of law living apart from the family with her husband, is not entitled to a separate allowance for maintenance out of the income of the family property.
Semble—The husband is bound to maintain his wife out of his self-acquired means so long as she continues to live with him 196

ANCESTRAL PROPERTY.
See HINDU LAW 60

APPEAL.
No appeal lies against an order passed upon an application made before decree under Section 73 of the Civil Procedure Code except in case of an appeal from the decree itself as provided for in Section 363.... 22
See CIVIL PROCEDURE CODE... 26
An appeal lies against an order of the Session Court imposing a fine upon a witness under Section 228 of the Penal Code for intentional insult to the Session Judge sitting in a stage of a Judicial proceeding.... 146
Where the High Court were satisfied that the witness did not intend to insult the Judge, the order was set aside. 146
By Madras Act VIII of 1865, an appeal from the decree of the Collector lies to the Civil Court. The Civil Judge has no power to refer appeals under the Act to a Principal Sadr Amin for disposal 227
See CIVIL PROCEDURE CODE .. 254
" " (Rulings)... lvi

ARREST ON CIVIL PROCESS.
See DEFENDANT 145
See WITNESS... 145
See SUNDAY (Rulings) ... lxiii

ASSESSORS.
See CRIMINAL PROCEDURE CODE (Rulings) xxxix

ASSIGNMENT OF CONTRACT.
See HINDU LAW 176

ATTACHMENT.
See PRIORITY OF CREDITORS ... 49
The stipend of a Carnatic Stipendiary is not liable to attachment in execution of a decree obtained against the stipendiary, it being one of the description of personal grants expressly protected from attachment in satisfaction of any decree or order of a Court by Section 3, Regulation IV of 1831, extended by Act XXXIII of 1838.
These enactments are not impliedly repealed by Sections 205 and 237 of the Code of Civil Procedure. 277
See LIMITATION 281
An attachment of property in execution of a decree operates *de die in diem* as process of execution upon the decree 316
See CRIMINAL PROCEDURE CODE (Rulings) xliii

AWARD.
A suit lies to enforce an award made without the intervention of a Court of Justice
The procedure provided in Section 327 of the Civil Procedure Code is not imperative upon a plaintiff who seeks to enforce an award so made. 119

BARRISTER.
See ADVOCATE 244

Page.

BATTA.

See EXECUTION OF DECREE ... 76

BETROTHAL.

See HINDU LAW 339

BONA FIDE PURCHASER FOR VALUABLE CONSIDERATION WITHOUT NOTICE.

See MORTGAGE... 369
See PRIORITY OF CREDITORS ... 434

BOND.

See LIMITATION 330

BREACH.

See AGREEMENT 325

BREACH OF TRUST.

A suit is maintainable to compel the defendant as heir of the late Manager of a temple to make good out of the property inherited by him the deficiency in the Devastanum funds caused by breach of trust and misappropriation by the late Manager 2

See ACT XX OF 1863.

CARNATIC STIPEND.

See ATTACHMENT 277

CASTE.

See AGREEMENT. 325

CAUSE OF ACTION.

See LIMITATION ... 266, 409
See MESNE PROFITS 302

CERTIFICATE.

An application by a daughter-in-law under Act XXVII of 1860 for a certificate as heiress would be properly rejected upon the sole ground that the applicant was not the heiress.

If a Civil Court is proceeding under Section 8 of Act XXVII of 1860 to grant or has granted a certificate authorizing a person to deal with Government Securities which are claimed by a third person as his property, that is a ground on which such third person may come into Court to oppose the grant of a certificate or to seek for its cancelment ... 180

Where it is sought to recover the penalty described in Section 17 of Act IX of 1868 from any person who omits to take out a certificate, the Collector who issued the notice should prefer a complaint before a Magistrate, and the Collector cannot prefer the complaint before himself in his capacity of Magistrate. (Rulings) ... lxii

CIVIL PROCEDURE CODE.

The plaintiff sued on a mortgage bond executed by the 1st defendant. The 2nd defendant, who claimed the property under a mortgage from the 1st defendant, was admitted a defendant on his own application; but, afterwards excluded from the suit. Before this was done, he had incurred certain costs which, by the Munsif's decree, he was ordered to bear himself. Upon appeal by the 1st defendant, the Civil Judge found that the mortgage bond sued upon was not proved, dismissed the suit, and ordered the plaintiff to pay all costs, those of the 2nd defendant included. *Held*, that under Sec. 337 of the Civil Procedure Code it was competent to the Civil Judge so to modify the Munsif's decree, as the main ground of the whole decision, viz., the validity of the mortgage bond, affected all the defendants in common, and the appeal of the 1st

Page.
defendant and the decision of the Appellate Court had reference to that common ground 26
The first hearing of a suit took place on 16th November, when issues were settled, and the final hearing of the suit was fixed for the 22nd January following. On the 22nd January the plaintiff changed her vakil and applied by the new vakil for a summons for a witness, and on the 23rd the new vakil stating that, owing to the absence of his witnesses, he was not prepared to go on with the case, the Judge dismissed the suit.
Held, that under Section 148 of the Civil Procedure Code, the Judge was justified in dismissing the suit. ... 56
Section 119 of Act VIII of 1859 does not empower a Judge to set aside a decree passed under Section 148 of the same Act 56
Semble—Section 114, as well as Sections 110 and 111 of the Code, has reference only to the first hearing of the suit, which may be either on the day named in the summons, or on a subsequent day to which such hearing may have been adjourned 56
The procedure provided in Section 327 is not imperative upon a plaintiff who seeks to enforce an award made without the intervention of a Court of Justice... 119
In a suit to recover the balance alleged to be due on a partnership transaction, the 1st defendant who was examined as a witness for the

Page.
plaintiff refused to produce certain accounts relating to the partnership which he was directed to produce by the Civil Judge. Thereupon judgment was given against the 1st defendant under Section 170 of the Civil Procedure Code.
On appeal, the High Court, holding that the accounts were relevant and material evidence in the suit, and that the Civil Judge was justified in requiring the 1st defendant to produce them, and being satisfied that the accounts were in the possession or control of the 1st defendant, affirmed the judgment of the Civil Judge.... 142
The provisions of Section 170 of the Code of Civil Procedure ought to be exercised with the most temperate discretion.
Where the Court might have treated one of the defendants as in default and passed judgment against him under the above Section, but instead of doing so passed over the default and made an order adjourning the further hearing of the suit, and on the day to which the hearing was adjourned, disposed of the suit under Section 170 1
Held that the Court by its own act was not in a position to treat the defendant as in default 231
The parties to a suit appeared on the day fixed for the first hearing. On the application of the defendants' vakil, the hearing was adjourned in order to enable them to obtain certain documents from

Page.

the Collector's Office and afterwards put in written statements. This they failed to do on the day to which the hearing was adjourned, and when the suit came on for final hearing, they were still in default, and also failed to appear in person or by vakil. A decree was given for the plaintiff.

Held that the decree of the original Court was not an *ex-parte* decree under Section 147 of the Code of Civil Procedure for non-appearance, but a decree under Section 148 and was therefore appealable 254

Where no liability to mesne profits is imposed by a decree, Section 11 of Act XXIII of 1861 does not give a power to extend the relief granted by the decree in respect of the right to mesne profits, but only to determine questions regarding the amount thereof when the right thereto has been ascertained by the decree 257

See LIMITATION 263

Regulation IV of 1831 extended by Act XXIII of 1838 is not impliedly repealed by Section 237 of the Code of Civil Procedure 277

An agreement to take an oath by the parties to a suit filed in Court is not an adjustment by mutual agreement or compromise within the meaning of Section 98 of the Code of Civil Procedure. The defendants agreed that a decree should be passed against them if they failed to perform an agreement by which they bound themselves to take an oath, the terms of which were set forth in the agreement, and one of them failed to take the oath. The Lower Courts thereupon passed a decree for the plaintiff.

Held by the High Court that the procedure of the Lower Courts was not sanctioned by law 422

A suit does not lie to enforce a liability specifically imposed by the decree of a Civil Court in the Mofussil, the right of suit in such case being taken away by Section 11 of Act XXIII of 1861... 453

The plaintiff brought a suit to establish his right to certain property as against the claim which the defendant had successfully made under Section 246 of the Civil Procedure Code in execution of a decree obtained against the plaintiff. The order of the Court directed the release of the property from attachment. The present suit was brought more than one year from the date of the order.

Held.—per Scotland, C. J. Bittleston and Collett, J. J. (Innes, J, doubting) that the plaintiff was a party against whom the order was "given." within the meaning of the Section, and that the suit was barred by the Section... ... 472

See VAKIL (Rulings) ... xliii

It is the duty of Appellate Judges to act so far in conformity with the provisions of the Code of Civil Procedure as is sufficient to show that the Court has dealt

Page.

with each ground of appeal, and more especially to record distinct findings on questions of fact.

Where the Civil Judge, confirming a decree of the District Munsif, stated by way of a judgment that he was of opinion that the decision of the Munsif was fair and equitable, the High Court on special appeal sent back the case with directions to the Civil Judge to record a judgment in substantial conformity with the provisions of the Code of Civil Procedure (Rulings) lvi

CHARITY.

See MAHOMEDAN LAW 44

COMMITTEE OF DISTRICT.

See Act XX of 1863... ... 404

The defendant was sued as a trustee of a temple to recover money for which he had not accounted. The defendant was dismissed by three members of the District Committee, which consisted of six members, the other three members refusing to sign the order of dismissal. The plaintiffs were appointed trustees in place of the defendant by the members who dismissed the defendant.

Held, that the appointment of the plaintiffs was invalid, and that they were not entitled to sue the defendant 443

COMPLAINANT.

See CRIMINAL PROCEDURE CODE 162

COMPENSATION.

An order directing compensation under Act XIII of 1859 is illegal.

Such portion of the money

Page.

advanced to the defendant as had been appropriated to the fulfilment of the contract, or as could justly be set-off against a part fulfilment of the contract, ought not to be ordered to be refunded (Rulings) ... lxviii

CONCEALS OR DETAINS.

See PENAL CODE 20

CONCEALING BIRTH.

See PENAL CODE (Rulings)... lxiii

CONDITION REPUGNANT TO GRANT.

See PARTITION. 345

CONSIDERATION.

See ILLEGAL CONTRACT. ... 7

See COVENANT IN RESTRAINT OF TRADE. 77

The defendants entered into a contract with the plaintiff in writing by which, in consideration of the trouble taken and large sums of money advanced by the plaintiff on behalf of the defendants, the defendants promised that they would from generation to generation pay to the plaintiff rupees 100 per annum out of a specified fund.

Held, that the undertaking of the plaintiff to forbear from enforcing the debt due to him prior to the contract was a sufficient new consideration to support the promise.... 447

CONTEMPT OF COURT.

A Criminal Court inflicting a fine for contempt of Court should specifically record its reasons and the facts constituting the contempt, with any statement the offender may make, as well as the finding and sentence.

Where this course was not adopted, the High Court

Page.
set aside the order inflicting a fine. 230
CONTRADICTORY STATEMENTS ON OATH.
See PENAL CODE. 51
CONTRACT
See ILLEGAL CONTRACT ... 7
CONTRACT FOR COMPOUNDING THE PROSECUTION OF CRIMINAL PROCEEDINGS AGAINST THE MUNICIPAL LAW OF A FOREIGN COUNTRY.
The plaintiff, a resident of Pondicherry, held a bond from one of the defendants (the 2nd) for a certain sum of money. This bond the plaintiff charged the said defendant before the French Legal authorities with having fraudulently abstracted from his house in Pondicherry, and he obtained the arrest and extradition from British territory of the 2nd defendant, as also of his brother the 1st defendant.
The latter on his way to Pondicherry met the plaintiff, and a settlement of accounts took place. The 5th, 6th, 7th, and 8th defendants made themselves liable by executing the bond sued on for the sum found due to the plaintiff, and took indemnity bonds to themselves from the 1st defendant, the consideration being the agreement of the plaintiff to discontinue further proceedings on the criminal charge. The Court at Pondicherry sanctioned the agreement as a compromise by civil redress, and suspended further proceedings in accordance with the law in force in the Settlement.
Held, that the contract was enforceable, the facts of the case not showing the compromise to be in its nature prejudicial as being in contravention of public policy under the Government of British India, or injurious to the good order and interests of society in regard to the administration of public justice. 177
The English Common Law rule, that contracts for the compounding or suppression of criminal charges for offences of a public nature are illegal and void, has no application to a contract for compounding the prosecution for criminal proceedings for an offence against the Municipal Law of a foreign country. 177
The rule of International Law that the law of the place of a contract governs its validity is subject to the qualification that every State may refuse to enforce a contract when it is for the fraudulent evasion of its laws, or is injurious to its public institutions or interests...... 177
See COVENANT IN RESTRAINT OF TRADE. 77
Where a writing signed by the defendant was in these terms, "S. (defendant) holds rupees 475, which sum is the property of L," (the plaintiff,)
Held, that the document could not be considered a written contract or engagement... 216

CONTRACT OF HIRING AND SERVICE BY BARRISTER.
See ADVOCATE 244

CONVERT TO CHRISTIANITY.
See PENAL CODE 185

Page.

COVENANT IN RESTRAINT OF TRADE.

In the case of covenants in restraint of trade, the deed of covenant must show a good consideration. The Courts will not enter into the question of the adequacy of the consideration. A covenant giving appellant the exclusive right to convey passengers to and fro on the road between Ootacamund and Metapolliem, is not a contract in general restraint of trade, and therefore is one which the law will enforce... 77

CRIMINAL BREACH OF TRUST.

See PENAL CODE (Rulings)... xxxiii

CRIMINAL PROCEDURE CODE.

See WITNESS 81

A Magistrate is bound at least to examine a complainant before he can exercise the discretionary power to issue process or dismiss the complaint which is given to him by Section 67 of the Code of Criminal Procedure. 162

The severity of a sentence is not of itself a ground on which the High Court can call for the record of a trial or other judicial proceeding under the general power of revision given by Section 404 of the Code of Criminal Procedure (OVERRULED) ... 242

The charge and finding in a case of causing hurt under Section 324 of the Indian Penal Code need not contain a negation that the hurt was caused on grave and sudden provocation (Rulings) v

See WITNESSES (Rulings) ... vi

Dismissal of a complaint under Section 269 of the Criminal Procedure Code in consequence of non-attendance of the complainant, the order of dismissal having been passed before the trial commenced, amounts to a discharge without trial, and does not bar the complaint from being again preferred (Rulings)... viii

A charge alleging a previous conviction need not show the extent of the former punishment. Revised form of charge. (Rulings)... ... xi

Right of way is a right of use of land within the meaning of Section 320 of the Criminal Procedure Code. (Rulings) xii

See JURISDICTION (Rulings) ... xiii

The offences specified in Sections 411 and 414 of the Penal Code cannot be considered as two distinct offences so as to allow of the procedure of Section 46 of the Criminal Procedure Code being adopted. (Rulings) xiv

See JURISDICTION (Rulings)...xvii, [xviii

See MAGISTRATE (Rulings)... xx

See EVIDENCE „ ... xxii

In an enquiry under Chapter XIX of the Criminal Procedure Code, the defendant should have an opportunity of cross-examining the witnesses produced against him, of making his own statement, and of calling witnesses on his own behalf. (Rulings) xxii

See JURISDICTION (Rulings)...xxvi [xxviii, xxxi, xxxvi

See SENTENCE... ii

Section 266 of the Code of Criminal Procedure only requires the Magistrate to hear such witnesses as the

Page.
accused shall produce in his defence. (Rulings) ... xxix
The High Court has power to mitigate a sentence passed by a Magistrate and confirmed on appeal by the Court of Session under Sections 405 and 428 of the Criminal Procedure Code. (Rulings)... xxxvi
In a trial before a Session Judge with Assessors when the prisoner pleads not guilty, and the Public Prosecutor does not offer evidence in support of the charge, the Judge ought to instruct the Assessors that they are bound to find the prisoner not guilty. (Rulings)... xxxix
Under Section 273 of the Code of Criminal Procedure, a full-power Magistrate may refer for enquiry to a Subordinate Magistrate Criminal cases, that is *primâ facie*, any Criminal Case. The reference may be for enquiry or for trial by the Sub-Magistrate or with a view to commitment either to a Court of Session or the High Court. (Rulings) ... xl
Until the finding is recorded, the trial is incomplete. If, before the finding is recorded, the presiding officer of a Court is removed, the successor cannot pass judgment upon consideration of the evidence recorded by the predecessor. (Rulings)... xliii
Where the condition of bail bonds given by the defendants and by the surety of a security bond was that the defendants should appear when called upon—*Held* that the defendants and their surety were

Page.
entitled to reasonable notice of the time at which the former would be required to attend. (Rulings) xlv
Where a Magistrate required security from persons for their good behaviour under Sec. 296 of the Criminal Procedure Code, and in default sentenced them to six months' rigorous imprisonment, held that the order was illegal, Sec. 301 requiring that they should be committed to prison until they furnish the security demanded. In fixing the amount of security, the Magistrate should not go beyond a sum for which there is a fair probability of the defendant being able to find security. (Rulings) xlvii
The words "order the attachment of any moveable or immoveable property" in Section 184 of the Criminal Procedure Code are enabling and not restrictive, and the Magistrate may attach both kinds of property. But he must issue his warrant of attachment simultaneously with the proclamation if he resorts to attachment at all. (Rulings)... ...xlviii
In order to give a Magistrate jurisdiction to make an order regarding the possession of land under Section 318 of the Code of Criminal Procedure, he must be satisfied that there exists a dispute likely to induce a breach of the peace, and he must record the grounds of his being so satisfied. It is not sufficient that there is a

Page.

mere scintilla of evidence, but there must be some evidence from which the Magistrate may reasonably draw the necessary conclusion of fact. The question whether any such evidence existed is one for the consideration of the High Court. (Rulings) xlix

A Subordinate Magistrate who issues a summons may take cognizance of the offence of disobedience to that summons, notwithstanding the repeal of Madras Act I of 1863. (Rulings) lii

The death of the husband does not necessarily put an end to a prosecution for adultery under Section 497 of the Penal Code. (Rulings) ... lv

See STAMP. (Rulings) ... lviii

See HIGH COURT AS A COURT of REVISION. (Rulings.) ... lxi

An order issued by a Magistrate under Sec. 62 of the Code of Criminal Procedure in consequence of a mahazirnamah signed by certain persons, but without any notice to the defendant or enquiry by the Magistrate, is illegal. (Rulings) ... lxvii

Section 294 of the Code of Criminal Procedure does not authorize the imprisonment of sureties. (Rulings) ... lxix

CROSS-EXAMINATION.

See CRIMINAL PROCEDURE CODE (Rulings) xxii

DAMAGES.

The plaintiffs, describing themselves as the agent and gumastah of the hereditary durmakurtah of the Trivellore pagoda, brought a suit for damages against the defendants, the Committee of the District appointed by virtue of Act XX of 1863, and their servants, for a trespass by the defendants in forcibly dispossessing them of the pagoda and the property therein, and for the wrongful removal and retention of the property. The plaint stated that the defendants were punished criminally for the trespass by the Magistrate, who, after enquiry under Sections 318 and 319 of the Criminal Procedure Code, restored the possession of the pagoda to the plaintiffs. The damages claimed were the value of jewels, cash, records and accounts not restored; the expense incurred by the durmakurtah in the purification of the pagoda; the amount of counsel's and vakil's fees in the Criminal proceedings; and the amount of income received by the defendants during their possession during a festival held at the pagoda.

Held, that the plaint was brought by the plaintiffs personally and not on behalf of the plaintiffs by the durmakurtah through his recognized agents; that the plaintiffs were entitled to recover a moderate amount of damages for the wrong done to them in ejecting them from the pagoda; that the expenses incurred in the Criminal proceedings instituted by the plaintiffs were not recoverable as damages, such damages not being directly traceable to the wrong and its natural and necessary consequence: that the amount of income

Page.

received by the defendants during the festival was a loss sustained by the durmakurtah and not by the plaintiffs personally, and that the plaintiffs had failed to make out the loss of property alleged ... 410

DAY.

See LIMITATION. 409

DECREE.

See CIVIL PROCEDURE CODE 26,254
See LIMITATION. 75
See SPECIAL APPEAL 312

In a suit to redeem, the plaintiffs produced a mortgage, the genuineness of which the defendants denied, but they produced a mortgage from the plaintiff's ancestors to their ancestors. The Principal Sadr Amin made a decree for the restoration of the lands according to the terms of the mortgage produced by the defendants. *Held,* that the Principal Sadr Amin was justified in making the decree 359

See ESTOPPEL 374

A suit does not lie to enforce a liability specifically imposed by the decree of a Civil Court in the Mofussil, the right of suit in such case being taken away by Section 11 of Act XXIII of 1861... 453

DEFAULT.

See CIVIL PROCEDURE CODE.
See MAGISTRATE (Rulings) x

DEFENDANT.

A defendant in a suit summoned by and examined as a witness for the plaintiff is entitled to protection from arrest on civil process during the time reasonably occupied in going to, attending at, and returning from, the place of trial 145

Where the Court might have treated one of the defendants as in default and passed judgment against him under Section 170 of the Code of Civil Procedure, but instead of doing so passed over the default and made an order adjourning the further hearing of the suit, and on the day to which the hearing was adjourned disposed of the suit under Section 170, *Held,* that the Court by its own act was not in a position to treat the defendant as in default 231

The parties to a suit appeared on the day fixed for the first hearing. On the application of the defendants' vakil, the hearing was adjourned in order to enable them to obtain certain documents from the Collector's Office and afterwards put in written statements. This they failed to do on the day to which the hearing was adjourned, and when the suit came on for final hearing, they were still in default, and also failed to appear in person or by vakil. A decree was given for the plaintiff. *Held,* that the decree of the original Court was not an *ex-parte* decree under Section 147 of the Civil Procedure Code, but a decree under Section 148 and was therefore appealable ... 254

See MAGISTRATE (Rulings).... xlvi

DELEGATION OF POWER.

See DEPUTY COLLECTOR (Rulings.) i

DEPUTY COLLECTOR.

A Deputy Collector, invested by a Collector with all the

Page.

powers of a Covenanted Assistant, or with the special power to determine claims under Regulation XII of 1816, is competent to refer cases under that Regulation for disposal to a District Munsif.

The authority must be delegated under Section 3, Act VII of 1857. (Rulings) ... i

DESCENT of PATTAM or OFFICE of DIGNITY.

See ALIYASANTANA LAW ... 28

DISCHARGE of DEFENDANT FOR NON-PAYMENT of BATTA—

See EXECUTION of DECREE... 76

DISCLAIMER.

See ESTOPPEL... 374

DISMISSAL OF HEREDITARY SERVANT OF PAGODA.

See SPECIAL APPEAL... ... 63

See Act XX of 1863... ... 112

DISMISSAL OF COMPLAINT.

See CRIMINAL PROCEDURE CODE. (Rulings)... ... viii

DISTRICT MUNSIF.

See JURISDICTION 149

DOWER, GIFT IN LIEU OF.

See MAHOMEDAN LAW ... 15

EASEMENT TO THE USE OF WATER.

In a suit to establish a right of water and for damages for interruption of the same, the facts were:—Plaintiff and defendant by agreement between them constructed a dam across a main channel, and from thence a smaller channel was made through the land of the defendant to the plaintiff's land, by means of which it was agreed that the plaintiff should be at liberty to irrigate his fields. This agreement was acted upon for a long course of years.

Held, that the agreement was not a mere parol license revocable at the pleasure of the defendant, but an agreement which created a right of easement, unlimited in point of time, to the use of the water by the plaintiff, and imposed upon the defendant the corresponding duty of allowing the accustomed supply to flow.

A mere license differs in its effects from a license coupled with the creation of an interest. The former is revocable, but the latter is subject to the same incidents and is as binding and irrevocable as any other contract, gift, or grant 98

EJECTMENT.

See SPECIAL APPEAL ... 312

ESCAPE.

See PENAL CODE 152

ESTOPPEL.

The plaintiff sued for a quantity of land which was family property in the possession of his brother, the defendant. The defendant in a former suit declared that the land sued for was not family property but belonged to his sister, and in this suit he claimed the property under her will.

The Lower Courts found that the property was family property, but that the plaintiff was entitled to a decree for the whole property on the ground that the disclaimer of the defendant in the former suit amounted to an estoppel and forfeiture of his share.

Page.

Held, that the effect of the defendant's conduct did not operate either as an estoppel or a forfeiture, and that the plaintiff was only entitled to a decree for a moiety of the property ... 374

Semble that an order of the Civil Court under Section 18 of Act XX of 1863, refusing leave to institute a suit, and deciding that the temple was governed by a hereditary durmakurtah, and therefore within Sec. 3 of the Act, was not conclusive upon the question of title between the parties... 410

EVIDENCE.

In a suit in which the question was whether there had been a division, the sole evidence of division was the decision of a punchayet reciting that division; the question, however, not having been at all material to the point then in dispute. *Held*, that the decision was not sufficient evidence of the division 5

Where an instrument purports to create an interest in immoveable property only as a collateral security for the payment of money, and is also a simple contract or bond for the payment of a debt, and where effect is sought to be given to the instrument only as a simple contract, it is admissible in evidence in a suit to recover the debt, though it has not been registered. So far as it is a contract for the payment of money, it is an instrument, the registration of which is made optional by Section 18 of Act XX of 1866. (OVERRULED) 174

Page.

Secondary evidence cannot be given of a lost instrument requiring a stamp which was not stamped. Quaere—Whether permission to pay the Stamp duty and penalty can be given in the case of a lost instrument 312

The plaintiff sued as the assignee of a mortgagee of immoveable property to recover the amount of the debt from the mortgagor in pursuance of an express contract to pay the debt contained in the mortgage.

The mortgage was executed before the Registration Act, (Act XVI of 1864,) came into operation. The assignment to the plaintiff was executed after the last Registration Act (XX of 1866) became law.

Held, per Bittleston, Innes, and Collett, J. J., that the assignment, being an instrument operating to create an interest in immoveable property, and as such requiring to be registered under Section 17 of Act XX of 1866, was not admissible in evidence in a suit to enforce the personal obligation only. Small Cause Court Referred Case No. 36 of 1868 dissented from. 378

Per Scotland, C. J.—That an instrument which has the two-fold operation of a simple contract or bond to pay a debt and a collateral mortgage security for the debt is admissible in evidence for the purpose of proving the simple contract debt ... 378

There is no rule of law that the uncorroborated evidence of an accomplice is insufficient for a conviction.

Page.

The proper form of the charge to the Assessors in such cases stated. (Rulings) vii

The depositions of Gosha ladies examined before the Committing Magistrate in the presence of the accused are not admissible in evidence on the trial before the Session Court. (Rulings) ... xv

A Session Judge should not permit the evidence of an approver who was examined as a witness before the Committing Magistrate to be laid before the Jury by whom the prisoners were tried. (Rulings) xxii

Where there is evidence which would justify the finding of a Magistrate that an act likely to cause a breach of the peace had been committed, the High Court will not interfere with the proceedings of the Magistrate. (Rulings) xxxviii

See CRIMINAL PROCEDURE CODE (Rulings) xlix

EXECUTION OF DECREE.

The discharge of a defendant from confinement in Jail, in consequence of the plaintiff's failure to pay subsistence money at the rate fixed by the Court, bars a second arrest and imprisonment in execution of the decree... 76

See LIMITATION 148, 151

Arrears of maintenance can be recovered by process of execution upon a decree providing for the payment of future maintenance. Where arrears of maintenance can be recovered by process of execution, they cannot be made the subject of a fresh suit 183

Page.

Where no liability to mesne profits is imposed by a decree, Section 11 of Act XXIII of 1861 does not give a power to extend the relief granted by the decree in respect of the right to mesne profits, but only to determine questions regarding the amount thereof when the right thereto has been ascertained by the decree 261

See LIMITATION 275

Process of execution cannot always be issued for three years' arrears under a decree directing annual payments of money for a series of years.

The petitioner, who had obtained a decree for an annual sum for maintenance during her life, alleged satisfaction of the decree up to a period less than three years from the date of the application for execution of the decree. *Held*, that the petitioner was entitled to execution of the decree at any time from the date at which the first instalment became due, but that she was not entitled to have process of execution issued within three years from the date at which the second or subsequent instalment became due... ... 275

See ATTACHMENT 277

Process of execution against the person or personal property of a judgment-debtor may be issued on the decree of a Court of Small Causes by a Court in another district. Before issuing such process of execution, the Court receiving the decree is bound to see that the pro-

Page.

visions in Sections 286 and 287 of the Civil Procedure Code have been strictly complied with.

The documents required to be transmitted for the purpose of obtaining execution are a copy of the decree and a certificate of any sum remaining due under it together with a copy of any order for execution that may have been passed.

Act XXVI of 1867 requires that copies of the decree and of the order for execution should be stamped. The certificate requires no stamp 331

A suit does not lie to enforce a liability specifically imposed by the decree of a Civil Court in the Mofussil, the right of suit in such case being taken away by Section 11 of Act XXIII of 1861. 433

See LIMITATION 472

FALSE PERSONATION.

See PENAL CODE.... ... 18

FETTERS.

See PRISONER IN FETTERS (Rulings.)... lxix

FINE.

See CONTEMPT of Court. ... 230

FORFEITURE.

See ESTOPPEL 374

FRAUD UPON CREDITORS.

See HINDU LAW.... 84

GIFT (REVOCATION OF.)

See MAHOMEDAN LAW... ... 44

GIFT VALID AS AGAINST CREDITORS.

See HINDU LAW.... 84

GIFT IN LIEU OF DOWER.

See MAHOMEDAN LAW 115

See HINDU LAW... 460

GUARDIANSHIP.

See HINDU LAW... 339

Page.

HIBBANAMAH.

See MAHOMEDAN LAW ...115

HIGH COURT AS A COURT OF REVISION.

See CRIMINAL PROCEDURE CODE 242

See SENTENCE (Rulings) ...xxxvi

Where there is evidence which would justify the finding of a Magistrate that an act likely to cause a breach of the peace had been committed, the High Court will not interfere with the proceedings of the Magistrate. (Rulings) xxxviii

See CRIMINAL PROCEDURE CODE (Rulings)... xlix

Where a Subordinate Magistrate of the 1st class acting without jurisdiction held a trial and acquitted the accused person under Section 255 of the Code of Criminal Procedure : held that the High Court alone could set aside the finding under Section 404, and that the Magistrate of the District had no power to do so under Section 435 of the Code as amended by Act VIII of 1869 (Rulings)... ... lxi

The High Court as a Court of revision has jurisdiction to set aside a finding of acquittal by a Session Court by virtue of Section 405 of the Code of Criminal Procedure. (Rulings lxx

HINDU LAW.

A son during the life of his father has, as co-parcener, a present proprietary interest in the ancestral property to the extent of his proper share, but beyond that he has vested in him no legal interest whatever whilst his father is alive.

Page.

Except in respect of his co-parcenery rights, a son is not in a different position as to the corpus of the ancestral property from that of any other relation who is an heir apparent of the owner of property.

Though the Limitation Act may have been decided to be a bar to a suit by the son for partition, his right as co-parcener has not thereby been destroyed, and it may be that he is entitled to relief against the improper disposal by the defendant of more than his proper share of the property ... 60

A voluntary transfer of property by way of gift, if made *boná-fide*, and not with the intention of defrauding creditors, is valid as against creditors.

The Hindu and English Law on the subject discussed... 84

See ADOPTION... 165

According to Hindu Law not only is the beneficial interest in the subject matter of the contract but the contract itself is assignable.

The assignee therefore may sue in his or her own name. This doctrine is applicable to suits brought in the Madras Small Cause Court ... 176

A daughter-in-law is not the heiress of her mother-in-law according to Hindu Law 180

A suit may be maintained against a surety according to Hindu Law, although the principal debtor has not been sued... 190

See INHERITANCE 204

A widower can make a valid adoption according to Hindu Law. *Semble*, the Hindu Law does not prohibit an adoption by a man who has not been married... ... 270

According to Hindu Law sons acquire rights only in the property which belonged to their father at the time of their birth and have no legal claim to property of which a *bona-fide* disposition, effectual as against their father, had been made long before they were born.

The right of an after-born son to share as a co-parcener divided property depends upon his mother being pregnant with him at the time of a partition.

The father of the plaintiffs adopted the 3rd defendant. After the adoption the wife of the father gave birth to a son. Thereupon the father effected a division of the property with the adopted son and gave the latter a larger share than he was entitled to receive by law. The father married a second wife, and the plaintiffs were the issue of the marriage. *Held* that the plaintiffs were not entitled to a partition of any portion of the property which fell to the share of the adopted son... ... 307

The plaintiff, the divided brother of the defendant's deceased husband, sued to obtain a declaration of his independent legal right to betroth the infant daughters of his deceased brother by the defendant to persons of his own choosing without the interference of the defendant, and of her obligation to accept any persons whom he may se-

Page.

lect, and provide for the celebration of their marriages.

Held,—That the exclusive right sought to be enforced by the plaintiff was not warranted by Hindu Law, apart from the legal position and rights of the defendant as the guardian of her daughters and possessor of her husband's property, which however presented still stronger grounds of objection to the plaintiff's claim. 339

See ESTOPPEL 374

An instrument was executed by the defendant, a Hindu, to his wife, stipulating that the defendant and his wife should continue to enjoy certain immoveable property jointly, with a right of survivorship, and containing a promise by the defendant to surrender the property to his wife if he married again.

Held, that the instrument did not operate by way of gift, there being no change in the possession of the property, nor as a declaration of trust, and that it did not create a binding obligation which the law would enforce. 460

Quære—Whether the Hindu Law admits of the applicability of the principle on which Courts of Equity in England hold voluntary declarations of trust to be binding against the declarant 460

A perpetual or permanent lease at a low fixed rent made by a Zemindar who obtained the zemindary by self-acquisition is binding upon the Zemindar's successors, although the instrument was not registered under Regulation XXV of 1802, Sec. 8. 463

Page.

HURT.

See CRIMINAL PROCEDURE CODE (Rulings) v

HYPOTHECATION.

See PRIORITY OF CREDITORS... 434

ILLEGAL CONTRACT.

A contract to pay money upon the consideration that the plaintiff would give evidence in a civil suit on behalf of the defendant cannot be enforced.

Such a contract is either for true evidence, and then there is no consideration, or for favorable evidence, either true or false, and then the consideration is vicious.... 7

Semble, If the consideration had been the plaintiff's promise not to evade process that would still be no consideration for the defendant's undertaking... ... 7

ILLEGITIMACY.

See INHERITANCE 204

INAM.

Regulation VI of 1831 prohibits the Civil Courts from taking cognizance of a suit brought to recover the value of three years' produce of certain land (held by the plaintiff on service Inam tenure,) on the ground that the defendant, who held a lease from the plaintiff, wrongfully refused to give up possession on the expiration of his lease and continued to hold the land and to deprive the plaintiff of the possession and enjoyment thereof.

Page.
Bassapah v. *Kooroovatappa* Mad. Sadr Dec. 1858, p. 268, distinguished. ... 70

INCESTUOUS INTERCOURSE.
See INHERITANCE 204

INHERITANCE.
A daughter-in-law is not the heiress of her mother-in-law according to Hindu Law ... 180
The illegitimate son of a Sudra, being the offspring of an incestuous intercourse, (intercourse between a father-in-law and his daughter-in-law) is not entitled to inherit or share in the family property according to Hindu Law 204
Semble.—To entitle the illegitimate sons of a Sudra by a Sudra woman to inherit a share in the family property, the intercourse between the parents must have been a continuous one and the woman must have been an unmarried woman. Therefore the illegitimate son of a Sudra by a Sudra woman living with him in adultery is not entitled to a share in or to inherit the family property 204
The words "the heirs of the preceding kurnum" in Section 7 of Regulation XXIX of 1802 mean his next of kin according to the order of succession of several grades of legal heirs and not heirs in the order of succession to undivided divisible ancestral property ... 234
A daughter's son is one of the nearer sapindas, and in the line of heirs before a brother's son according to Hindu Law 234
Semble, an illegitimate son of a Sudra by his concubine is his heir in preference to a brother's son 234
The right of an after-born son to share as a co-parcener divided properly depends upon his mother being pregnant with him at the time of partition 307

INSULT TO JUDGE.
See APPEAL 146
See CONTEMPT OF COURT. ... 230

JURISDICTION.
A District Munsif is a Small Cause Court Judge under Madras Act IV of 1863 within Act XI of 1865 ... 149
The Civil Court has no jurisdiction under Section 29 of Regulation IV of 1816 to make an order for the execution of a decree in a suit tried before a Village Munsif. The Section only applies where a Village Munsif has been guilty of corruption or partiality in the decision of a cause tried by him 188
Where an agreement in writing was signed by the plaintiff and the defendants at Secunderabad in the territories of the Nizam for a partnership in a Tannery business to be carried on at Bakaram, near Hyderabad, and by the terms of the agreement the tanned skins were to be sent to the plaintiff at Madras for sale or shipment to England, and hundies in respect of the goods sent to Madras were to be drawn upon the plaintiff at Madras and paid by him and accounts of the partnership transactions were to be sent to the plaintiff once in eight days.
Held, in a suit for an account of the partnership dealings,

Page.

that the cause of action had arisen in part within the original Civil jurisdiction of the High Court, and, the leave of the Court to bring the suit having been obtained under Section 12 of the Letters Patent of 1865, that the Court had jurisdiction to entertain the suit 218

Held, also that the jurisdiction of the Court was not affected by the circumstance that the defendants were non-resident foreigners 218

The power of a Civil Judge to transfer appeals to a Principal Sadr Amin is confined by clause 3, Section 8 of Act VII of 1843, to sppeals from District Munsifs 227

Several claims, each of which separately is within the Small Cause jurisdiction of a District Munsif, may be joined together and form the basis of a suit in the Small Cause Court ... 334

The plaintiff was the lessor, and he defendant the lessee of certain land under an agreement whereby the defendant agreed to occupy the land for two years and to deliver a certain quantity of paddy at four specified periods. Defendant failed to deliver the paddy.

In a suit for rent. *Held*, that, although the plaintiff might have sued for each instalment of rent as it fell due, the aggregate of such unpaid instalments should be deemed one cause of action. 334

Plaintiff sued to establish his right to receive certain honors in a temple as appertaining to his office of officiating Priest of the temple, and to recover damages for the invasion of his right. In a former suit between the predecessor of the plaintiff and the 1st defendant, the claim to sit at the right side of the idol at festivals was admitted, but the right to receive a cake on the same occasion was disallowed.

Held, that the claim of the plaintiff, so far as it sought to establish the plaintiff's right, was *res judicata* ... 349

Held, also that the suit of the plaintiff to recover damages for the invasion of the right of the plaintiff appertaining to an office in the temple was one which it was competent to the Civil Courts to entertain 349

See Recovery of Rent ... 393

A suit to recover the value of goods distrained for rent under Madras Act VIII of 1865 and forcibly carried away from the person distraining may be maintained in a Court of Small Causes under Section 27 of the Act.

The suit may be brought either by the landlord or the person authorized to distrain.

A petition and summons and an order, after hearing the parties and their evidence, appear to be the fitting mode of exercising the jurisdiction 401

The defendants entered into a contract with the plaintiff in writing, by which, in con-

Page.

sideration of the trouble taken and large sums of money advanced by the plaintiff on behalf of the defendants, the defendants promised that they would from generation to generation pay to the plaintiff rupees 100 per annum out of a specified fund. The plaintiff brought a suit to recover a sum within the pecuniary jurisdiction of the Small Cause Court under the written contract.

Held, that the Small Cause Court had jurisdiction to entertain the suit, and that the undertaking of the plaintiff to forbear from enforcing the debt due to him prior to the contract was a sufficient new consideration to support the contract 447

Held also that on the death of one of the co-contractors the whole liability to the plaintiff attached to the surviving co-contractors ... 447

A Session Judge has no authority to suspend his own sentence. (Rulings)... ... ii

The Courts no longer possess the power of settling cases by "oath" (Rulings) ... iii

Recruiters of Emigrants charged under Section 71, Act XIII of 1864, must be tried by the Magistrate within whose jurisdiction the holding out of false pretences to the laborers took place. (Rulings) iv

Magistrates of all grades are under Madras Act III of 1865 competent to try persons charged with offences under the Railway Act XXIII of 1854 (Rulings)... ix

Page.

A Magistrate has no ground for proceeding under Chapter XXII of the Criminal Procedure Code where there is no dispute as to the fact of actual possession of either the land or crop. (Rulings) xiii

A Subordinate Magistrate has no power under the Criminal Procedure Code to take recognizances from a complainant and witnesses to appear on a certain day before a Magistrate of co-ordinate jurisdiction, and recognizances thus taken cannot be forfeited (Rulings). xvii

A Subordinate Magistrate has no power to order a recognizance executed by a prosecutor before a Police Station Officer binding himself to appear before the Subordinate Magistrate to be forfeited on the failure of the prosecutor to appear. (Rulings) xviii

A sentence duly passed and recorded cannot be revised by the Judge (Rulings) ... xix

The only acts or omissions over which a Magistrate has jurisdiction under Act I of 1858, are those specified in the 1st Section. Cases under Section 6 of the Act are not cognizable by a Magistrate. (Rulings) ... xxi

A Magistrate is not empowered to try an European British Subject under clause 5, Section 83 of Act I of 1859, (the Merchant Shipping Act.) (Rulings.) ... xxiii

The jurisdiction given by Section 320 of the Code of Criminal Procedure to decide for a time the right to the enjoyment of property should not be exercised

Page.

except on clear and satisfactory proof. Where the only evidence is that of user it should be such as to show satisfactorily acts of enjoyment exercised as a matter of right and permitted uninterruptedly for some considerable length of time. (Rulings)... ...xxvi

A Magistrate has no power to seize the property of a person convicted by him when the person convicted has not been directed to pay a fine. Nor has a Magistrate power to take property from one defendant and give it to another defendant. (Rulings)... ...xxviii

A Magistrate of the District has no power to direct a Subordinate Magistrate to commit for trial in the Session Court accused persons who have been discharged by the Subordinate Magistrate, and such committal when made by the Subordinate Magistrate is illegal. The Session Court is the only authority empowered by law to direct a committal. (Rulings) xxxi

Orders by a Sub-Magistrate, in one case directing the removal of a house on the ground that it was in a dangerous and dilapidated condition, and in the other directing the removal of a granary on the ground that it had been improperly erected upon land required to be kept unoccupied for common purposes, were set aside by the High Court because the Sub-Magistrate acted without jurisdiction (Rulings.) xxxv

Page.

The High Court has power to mitigate a sentence passed by a Magistrate and confirmed an appeal by the Court of Session under Sections 405 and 428 of the Criminal Procedure Code. (Rulings.) xxxvi

Under Section 273 of the Criminal Procedure Code, a full-power Magistrate may refer for enquiry to a Subordinate Magistrate criminal cases, that is *primâ facie*, any criminal case. The reference may be for enquiry or for trial by the Sub-Magistrate or with a view to commitment either to a Court of Session or the High Court. (Rulings.)... xl

A Subordinate Magistrate has no power to dismiss a charge of Criminal misappropriation under Section 403 of the Penal Code for non-appearance of the complainant under Section 259 of the Criminal Procedure Code. That Section only applies to cases which fall within Chap. XV of the Criminal Procedure Code. (Rulings) xli

Until the finding is recorded the trial is incomplete. If before the finding is recorded the presiding officer of a Court is removed, the successor cannot pass judgment upon consideration of the evidence recorded by the predecessor. (Rulings) xliii

See MAGISTRATE. (Rulings) xliv

See CRIMINAL PROCEDURE CODE (Rulings) xlix

A Subordinate Magistrate who issues a summons may take cognizance of the offence of disobedience to that sum-

Page.

mons, notwithstanding the repeal of Madras Act I of 1863. (Rulings)... ... lii

By Madras Act III of 1865, a Native Deputy Magistrate has power to try Police officers above the rank of a Private charged with offences under the Madras General Police Act (XXIV of 1859) notwithstanding the proviso in Section 50 of the latter enactment. (Rulings) liv

Where a Subordinate Magistrate of the 1st class acting without jurisdiction held a trial and acquitted the accused person under Section 255 of the Code of Criminal Procedure: held that the High Court alone could set aside the finding under Section 404, and that the Magistrate of the District had no power to do so under Section 435 of the Code as amended by Act VIII of 1869. (Rulings) .. lxi

Where it is sought to recover the penalty described in Sec. 17 of Act IX of 1868 from any person who omits to take out a certificate, the Collector who issued the notice should prefer a complaint before a Magistrate, and the Collector cannot prefer the complaint before himself in his capacity of Magistrate. (Rulings.) ... lxii

Madras Act III of 1865 authorizes every Magistrate to take cognizance of offences against Act XIII of 1859. (Rulings.)... ... lxiv

See High Court as a Court of Revision. (Rulings) lxx

Kurnum.

See Inheritance 234

Page.

See Recovery of Rent ... 243

Plaintiff brought a suit to Recover land which had been enjoyed by her husband, the kurnum of a village, but which, on his death, had been given to the defendant with the office of kurnum. The land had been originally attached to the office, but the plaintiff's husband for a long time before his death was enjoying the land as his private property.

Held,—that the miras of the land continued to be attached to the office, notwithstanding that it may have been for some time enjoyed as private property; that the property being annexed to the office was indivisible, and as the Collector, in ejecting the plaintiff, appropriated the land to the office by putting it in the possession of the kurnum whom he appointed in place of the plaintiff's husband, the plaintiff had no right to recover. 336

Landlord and Tenant.

Where a written instrument purported to create the relation of landlord and tenant for five years, the plaintiff's (lessor's) tenure being that of a mirassidar, that is, a hereditary tenancy under Government determinable on default in payment of the proportion of the Mottafaisal assessment payable for the land.

Held, that the instrument did operate to create the relation of landlord and tenant, notwithstanding that the assessment was not permanently fixed. ... 153

Page.

Held, also that the written instrument was a lease, and was not liable to be stamped by virtue of the exemption to Article 42, Schedule A of Act X of 1862 153

See RECOVERY OF RENT.

Under Madras Act VIII of 1865, a landlord may compel a tenant to accept a puttah for palmyra trees... 398

LEASE.

See LANDLORD AND TENANT... 153

A permanent lease of a village in a muttah by the Muttahdar is not invalidated by Section 8 of Regulation XXV of 1802, although the lease has not been registered as required by that Section. *Subrayalu Naick v. Rama Reddy*, 1 Madras High Court Reports, overruled ... 396

A perpetual or permanent lease at a low fixed rent made by a Zemindar who obtained the zemindary by self-acquisition is binding upon the Zemindar's successors, although the instrument was not registered under Regulation XXV of 1802, Section 8 463

LEAVE OF CIVIL COURT TO INSTITUTE SUITS UNDER ACT XX of 1863.

See ACT XX OF 1863 ... 2, 404, 410

LETTERS PATENT.

See JURISDICTION 218

LICENSE.

See EASEMENT TO THE USE OF WATER 98

LIEN.

See PRIORITY OF CREDITORS ... 434

LIMITATION.

In a suit upon a bond, the plaintiff having sued the defendants, not on the ground of their personal responsibility, but as the legal representatives of the obligor, who was supposed to be dead:—

Held, that the suit is not maintainable before the lapse of the time which raises the legal presumption of the death of the obligor, unless there is proof of special circumstances which warrant the inference of his death within a shorter period ... 1

Section 14, Act XIV of 1859, applies to the case in which the plaintiff is unable, after due diligence, to procure due service upon the defendant of the summons to appear and answer the claim, and consequently to prosecute the suit to a decision, and will prevent a suit against the defendant's representatives from being barred... 1

A. B. and C. were brothers. In 1846 and 1847, a partition was effected between A, since deceased and C. on the one part and B. on the other, C. the plaintiff being at the time a minor. B. the defendant then obtained and since held separately as his share certain lands in the village of K. among others. By a razinamah in 1852, the same quantity of land was confirmed to him as his share. In 1855, certain proceedings were taken, the object of which was to adjust the shares so as to make them equal in quality as well as in quantity, B. the defendant continuing to hold nearly the same quantity of land, as he did before. C.

Page.

attained his majority in 1854, and in December 1863, brought a suit for a re-adjustment of the partition completed in 1847, so far as it respected the lands held by defendant in the village of K.

Held, that the suit was barred by the Act of Limitations. 10

The day on which an application for execution is made is not to be reckoned in computing the three years alluded to in Section 19, Act XIV of 1859 32

An order dismissing an appeal for default under Section 346 of the Civil Procedure Code is not a new decree from the date of which the period of limitation begins to run anew. 32

The appearance of the person in whose favor a judgment is given, as respondent on an appeal, is not an act done for the purpose of keeping the judgment in force within the meaning of Section 19, Act XIV of 1859... 32

Clause 2, Sec. I of Act XIV of 1859, applies only to suits for wages brought by a servant against the person liable as the master in whose service he had been employed, and the Section does not apply to a suit brought by one Government servant against another for the recovery of a sum of public money received by the defendant as a disbursement on account of the wages of the plaintiff, to whom the defendant was legally bound to pay it over.... ... 43

The effect of Section 11, Act XIV of 1859, is to provide a distinct period of limitation applicable to every case in which, but for legal disability, the suit would be barred.

In other words, to add three years from the time the disability ceases to the period of limitation made applicable by the Act to the particular case. 54

See Hindu Law 60

In order to keep a decree alive, it is, under Section 20 of the Limitation Act, not necessary that the application for execution should be made with the intention of enforcing the decree at that time. All that the Section requires is, that some proceeding shall have been taken to enforce the decree or to keep it in force within three years ... 75

The petitioners, as widow and adopted son of a decree-holder, applied by petition to the District Munsif for execution of a decree on the 17th June 1864.

The District Munsif made an order stating that execution would not be granted unless the petitioners obtained a certificate from the District Court under Act XXVII of 1860. In August 1864, an application was made for a certificate to the Civil Court, and an order was made refusing the application, and the order was affirmed on appeal. A second application was made for execution in July 1867.

Held, that the right of the petitioners to obtain execu-

Page.
tion was barred by Section 20, Act XIV of 1859. 89
The plaintiff sued the defendants for future and past maintenance and obtained a decree for future maintenance and for arrears of maintenance for seven years. The parties were governed by the Aliyasantana Law. It was found by the Lower Appellate Court that for twenty years before the suit the plaintiff lived apart from the defendants and the other members of the family and supported herself without receiving or applying for anything towards her maintenance out of the family property in the possession of the defendants or obtaining any recognition of her right to maintenance.
On special appeal, *held*, per *Scotland, C. J.* That assuming the Aliyasantana Law recognizes the right of the plaintiff to enforce separate maintenance as a charge upon the estate, the plaintiff's claim was barred by Section 1, Clause 13 of Act XIV of 1859.
Per *Collett, J.*—It is doubtful whether Section 13, which applies to cases where the right to receive maintenance is a charge on the inheritance of any estate, applies in a case where the right of the plaintiff is said to exist by reason of her being a co-proprietor with the defendants. If the suit be not within Section 13, then it was one to recover an interest in immoveable property, and was equally barred by Clause 12 of Section I of the Limitation Act. 133
Application for execution of a decree obtained in 1858 under the old law as to limitation was made in January and disposed of in February 1864, and a subsequent application was made in November 1867.
Held, that the first application was in time, but the second application was barred by Section 20, Act XIV of 1859 148
The filing of an application for execution is a proceeding within the meaning of Section 20, Act XIV of 1859, sufficient to give the decree-holder a new period of three years 151
Section 20 of the Limitation Act (XIV of 1859) is not applicable to a decree until the liability under it has become enforceable by process of execution. 173
See CONTRACT. 216
The period of limitation provided by Section 20 of Act XIV of 1859 runs not from the date of a former application for process of execution to enforce the decree, but from the date of the order upon the application.
An application to enforce the execution of a decree was made on the 30th August 1865. The application was dismissed by an order of the Court dated the 14th October 1865. The second application was made on the 6th October 1868.
Held, that the second application was not barred by the Limitation Act ... 260
A decree-holder applied for the

Page.

sale of certain property then under attachment in the suit. The Court refused to issue process for the sale on the ground that the property could not be sold, as certain claims and suits respecting it were still pending. The claims and suits having been determined, the application was renewed. More than three years had elapsed between the date of the order on the first application and the date of the renewed application.

Held, that the second application was not barred, the order upon the first application operating simply as a temporary stay of process for the sale of the property, and there was a pending proceeding to enforce the decree during the stay. ... 261

The plaintiff sued to obtain a decree declaring that the ancestral land possessed by the family of the plaintiff was not liable to seizure and sale in satisfaction of an *ex-parte* decree obtained by the defendant in a suit against the yejaman of the plaintiff's family on the ground that the decree had been obtained collusively and fraudulently for a debt alleged to have been contracted for the benefit of the family.

The decree against the yejaman was passed on the 22nd June 1857, and upon attachment of the family property the plaintiffs made a claim under Section 246 of the Civil Procedure Code, alleging their independent right to the property and resisting a sale. The claim was disallowed on the 18th October 1861, and an appeal from that decision was dismissed on the 15th November 1861. The present suit was instituted on the 2nd February 1864.

Held, that this was not a suit to which the limitation provided by Section 246 of the Civil Code or by Clause 5, Section 1 of Act XIV of 1859, was applicable, and that the suit was not barred.... 263

In a suit to recover from the defendant the amount of purchase money paid by the plaintiff upon a sale to him of certain land by the defendant's father and the costs incurred by the plaintiff in defending his title to the property against a prior purchaser for the same land from the defendant's father.

Held, that the period of limitation was six years.

Held also, that the cause of action arose on the discovery of the fraud upon the plaintiff, and that there was knowledge of the fraud at all events in October 1859, the date of the judgment of the Civil Court affirming the title of the prior purchaser, notwithstanding the presentation of an appeal from that decision, and notwithstanding that the plaintiff remained in possession of the land until 1861.

The present suit, having been brought more than six years after the judgment of the Civil Court, was held to be barred 266

Process of execution cannot

Page.
always be issued for three years' arrears under a decree directing annual payments of money for a series of years.
The petitioner, who had obtained a decree for an annual sum for maintenance during her life, alleged satisfaction of the decree up to a period less than three years from the date of the application for execution of the decree. The Judge was not satisfied of the alleged satisfaction, and dismissed the application for execution.
Held, that the petitioner was entitled to execution of the decree at any time from the date at which the first instalment became due, but that she was not entitled to have process of execution issued within three years from the date at which the second instalment or subsequent instalments became due.
Case remitted for inquiry as to the allegation of the petitioner of the receipt of maintenance in satisfaction of the decree within three years from the date of the application for execution.... 275
In a suit for a partition of family property in the possession of the plaintiff and defendants, part of the property was attached at the instance of one of the defendants in 1852 and the remainder of the property in 1864. Nothing was done with respect to the first attachment, but in 1865 a petition was presented by the plaintiff praying for the removal of the attachments. The petition was rejected, and the plaintiff brought this suit within one year from the date of the rejection of his petition. The plaintiff and defendants remained in possession notwithstanding the attachments.
Held, that the plaintiff's suit was not barred by the Act for the limitation of suits. 281
The plaintiff was, by an order of the Civil Court in execution of a decree, to which the plaintiff was no party, ejected from the possession of a muttah. He brought a suit more than three years afterwards to eject the legal representative of the person who was so put in possession.
Held (reversing the decree of the Civil Court) that the order of the Civil Court was not a summary decision within the meaning of clause 5, Section 1, Act XIV of 1859, and that the suit was not barred.
That clause is only applicable to orders which the Civil Courts are empowered to pass deciding matters of disputed property raised for hearing and determination by a summary proceeding between the parties disputing 297
See Mesne Profits 302
An attachment of property in execution of a decree operates *de die in diem* as process of execution upon a decree 316
The late Sadr Court, by an order dated the 25th July 1855, directed that the

Page.

judgment-debtor should be allowed to remain in the enjoyment of the property then under attachment, that an order for the sale of the property should be stayed, but that the attachment should continue in force until the further order of the Court.

On the 10th of May 1868, the High Court made an order setting aside the order of the Sadr Court dated the 25th July 1855, and stating that the assignee of the judgment-creditor should be left at liberty to apply for execution of the decree.

Upon application to the Civil Court of the district in which the property was situated, the Court decided that the application to obtain execution was barred by Act XIV of 1859.

Held by the High Court, that the right to enforce payment of the amount payable under the decree was not barred 316

The day mentioned in a bond for the re-payment of money as that on which the money is to be re-paid is to be excluded from the period of computation under the Limitation Act. The borrower in such case has, until the last moment of the day, mentioned for the payment, and the right to sue accrues not on but from that day 330

In a suit by a co-parcener to enforce a division of family property, it is necessary, in order to constitute the bar provided by Clause 13, Section 1 of the Limitation Act, to prove possession and enjoyment of the property as the possessor's own separate property to the absolute exclusion of the person suing to enforce the right to share for twelve years computed either "from the death of the person from whom the property alleged to be joint is said to have descended," or "from the last payment to the plaintiff or any person through whom he claims by the person in the possession or management of such property or estate on account of such alleged share." The question of fact whether there has been such exclusive possession or enjoyment must be decided upon the evidence in each case, and may be satisfactorily proved although there may be no evidence of an express refusal to allow the plaintiff any part of the benefits of the joint property 354

The 15th clause of Section 1 of Act XIV of 1859 does not require that the acknowledgment should be given to the mortgagor 359

In a suit to redeem, the plaintiff produced a mortgage, the genuineness of which the defendants denied, but they produced a mortgage from the plaintiff's ancestors to their ancestors. The Principal Sadr Amin made a decree for the restoration of the lands according to the terms of the mortgage produced by the defendants. The Civil Judge reversed the decision.

Held, in special appeal, that the Principal Sadr Amin

Page.
was justified in making the decree which he gave ... 359
The defendant, the payee of a promissory note, endorsed it to the plaintiff. The endorsement was " Pay to K. M. (plaintiff) or his order." The promissory note had been registered previous to the endorsement to plaintiff. A suit was brought by the plaintiff three years after the date of the endorsement to recover the amount of the note from the defendant. *Held*, that the suit was barred by the Law of Limitation... 366
An admission or acknowledgment in writing under Section 4 of the Limitation Act is sufficient to give a new period of limitation, although a promise to pay on request is not inferrible from it. The word due in the Section means no more than that the debt is owing and that there is an existing obligation to pay it.
An acknowledgment made in writing to a third party and not to the creditor is sufficient under the Section.
Quære.—Whether an acknowledgment to satisfy the Section must be made before suit 385
In calculating the period of limitation for bringing suits provided by Act XIV of 1859, the day on which the cause of action arose should be excluded from the computation 409
The plaintiff brought a suit to establish his right to certain property as against the claim which the defendant had successfully made under Section 246 of the Civil Procedure Code in execution of a decree obtained against the plaintiff. The order of the Court directed the release of the property from attachment. The present suit was brought more than one year from the date of the order. *Held*, per Scotland, C. J. Bittleston, and Collett J, (Innes J. doubting) that the plaintiff was a party against whom the order was "given" within the meaning of the Section, and that the suit was barred by the Section... 472

LOST INSTRUMENT.

Quære.—Whether permission to pay the Stamp duty and penalty can be given in the case of a lost instrument... 312

MAGISTRATE.

See CRIMINAL PROCEDURE CODE 162
The head of a village is within the definition of a Magistrate as defined in Section 15 of the Criminal Procedure Code. (Rulings) ii
See JURISDICTION (Rulings) iv
A Subordinate Magistrate cannot bind over witnesses by recognizances to appear before himself.
The proper course to enforce attendance is by summons, and, if that fails, by warrant. (Rulings) vi
Magistrates of all grades are, under Madras Act III of 1865, competent to try persons charged with offences under Section 20 of the Railway Act XXIII of 1854. (Rulings) ix
A Magistrate has no ground for proceeding under Chapter XXII of the Criminal Procedure Code where there is no dispute as to the fact of actual possession of

Page.

either the land or crop (Rulings) xiii

A Subordinate Magistrate has no power under the provisions of the Criminal Procedure Code to take recognizances from a complainant and witnesses to appear on a certain day before a Magistrate of co-ordinate jurisdiction, and recognizances thus taken cannot be forfeited. (Rulings) ... ...xvii, xviii

The inquiry contemplated by Chapter XXII of the Criminal Procedure Code is a personal inquiry before the Magistrate who makes the order. (Rulings) ... xx

The only acts or omissions over which a Magistrate has jurisdiction under Act I of 1858 are those specified in the 1st Section. (Rulings) xxi

A Magistrate is not empowered to try an European British Subject under clause 5, Section 83 of Act I of 1859 (the Merchant Shipping Act.) (Rulings) xxiii

See JURISDICTION (Rulings)... xxvi xxviii, xxxi, xxxv, xl

Section 266 of the Code of Criminal Procedure only requires the Magistrate to hear such witnesses as the accused shall produce in his defence (Rulings) ... xxix

A Subordinate Magistrate has no power to dismiss a charge of criminal misappropriation under Section 403 of the Penal Code for non-appearance of the complainant under Section 259 of the Code of Criminal Procedure. That Section only applies to cases which fall within Chapter XV of the

Page.

Criminal Procedure Code. (Rulings) xli

Where a defendant charged with an offence bound himself to appear before a Sub-Magistrate on the 10th June, and the defendant did appear on that day, but made default on the 11th of June on which the case was called:—*Held* that there was no forfeiture of the recognizance. In such cases Section 219 of the Code of Criminal Procedure requires that the Magistrate shall form a reasonable opinion that there has been wilful default before issuing process to enforce the penalty (Rulings) xliv

See CRIMINAL PROCEDURE CODE (Rulings) ... xlvii, xlix, lii

By Madras Act III of 1865, a Native Deputy Magistrate has power to try Police officers above the rank of a Private charged with offences under the Madras General Police Act (XXIV of 1859) notwithstanding the proviso in Section 50 of the latter enactment (Rulings) liv

See HIGH COURT AS A COURT OF REVISION (Rulings) ... lxi

Where it is sought to recover the penalty described in Section 17, Act IX of 1868, from any person who omits to take out a certificate, the Collector who issued the notice should prefer a complaint before a Magistrate, and the Collector cannot prefer the complaint before himself in his capacity of Magistrate (Rulings) lxii

Madras Act III of 1865 au-

Page.
thorizes every Magistrate to take cognizance of offences against Act XIII of 1859 (Rulings) lxiv
Where a Magistrate convicts a person of an offence he is bound to pass some sentence (Rulings) lxvi
An order issued by a Magistrate under Section 62 of the Code of Criminal Procedure, in consequence of a mahazirnamah signed by certain persons, but without any notice to the defendant or enquiry by the Magistrate, is illegal (Rulings) lxvii

MAHOMEDAN LAW.

According to Mahomedan Law a woman may manage the temporal affairs of a mosque, but not the spiritual affairs connected with it, the management of the latter requiring peculiar personal qualifications ... 23
Certain lands, choultries, and moveable property had been, by instrument in writing, given to the brother of the donor and his heirs for the purpose, in perpetuity, of keeping in repair the choultries and affording strangers the charities of shelter, and, if circumstances permitted, food also, as well as for supplying the wants of the donees—with clauses restraining alienation by them. *Held*, that the instrument effected a transfer of the property to the donees subject to the trust of applying the profits of the lands, &c., in perpetuity to certain charitable purposes and was not revocable whether the transaction be viewed as a pure trust or as a gift.

Page.
The power of revoking gifts is given under the Mahomedan Law only in the case of private gifts for the donee's own use, no relationship existing between the donor and donee.
The rule of Mahomedan Law that a Muttawalee, or Superintendent of an endowment, is removable for mismanagement, does not apply to the case of a trustee who has a hereditary proprietary right vested in him.
It is essential for the exercise by the donor of the power of removing a Superintendent that such power be specially reserved at the time of the endowment... ... 44
In a suit upon a hibbanamah alleged to have been executed by the husband of the plaintiff giving her twenty-two shares in a village as a gift in lieu of her dower, the Civil Judge dismissed the suit upon the ground that the omission of the amount of the dower rendered the instrument of no validity according to Mahomedan Law.
Held, (reversing the decree of the Civil Judge) that the suit was maintainable, the instrument expressing plainly the specific shares of the property, and that the gift was made in lieu of the whole dower, and there being no room for doubt as to the meaning and intention of the contracting parties in regard to the particular subjects either of the gift or of the consideration ... 115

MAINTENANCE.

See LIMITATION 137

Page.
Arrears of maintenance can be recovered by process of execution in a suit in which a decree is passed providing for the payment of future maintenance. Where arrears of maintenance can be recovered by such process of execution they cannot be made the subject of a fresh suit... 183
See ALIYASANTANA LAW ... 196
The rejection of an application for maintenance made by the wife of a Christian who had reverted to Hinduism and married a second wife is not warranted by the decision reported in III. M. H. C. Reps. (Rulings) vii

MESNE PROFITS.
See EXECUTION OF DECREE... 257
A suit brought by the plaintiff, a Zemindar, to recover mesne profits from the defendants who held under the preceding Zemindar whose possession of the zemindary during the period included in the suit was declared to be wrongful, was dismissed by the Civil Judge on the ground that puttahs and muchilkas had not been exchanged between the plaintiffs and defendants under Section 7, Madras Act VIII of 1865 302
Held, that the cause of action did not arise out of the relation of landlord and tenant, the ground of suit being that the defendants were wrongfully in the enjoyment of the villages as against the plaintiff and liable to account for all the profits received during the period of such enjoyment.

Page.
Held, further, that the period of limitation applicable to such a claim is six years before suit... 302

MARRIAGE.
See AGREEMENT. 325
See HINDU LAW 33

MISAPPROPRIATION.
See BREACH OF TRUST.

MISCHIEF.
See PENAL CODE Rulings... xvi

MORTGAGEE.
See PRIORITY OF CREDITORS 49,434.
The mere possession of the title-deeds by a second mortgagee, though a purchaser for value without notice, will not give him priority. There must be some act or default of the first mortgagee to have this effect 369
See REGISTRATION 378

MOTHER.
See HINDU LAW 339

MUCHILKA.
See RECOVERY OF RENT 149,243,393.

MUTTAH.
A permanent lease of a village in a muttah by the Muttahdar is not invalidated by Section 8, Regulation XXV of 1802, although the lease has not been registered as required by that Section. *Subroyalu Naick v. Rama Reddy*, 1 Madras High Court Reports, overruled... ... 396

OATH.
A Hindu who has become a convert to Christianity cannot be convicted under Section 193 of the Penal Code unless his evidence be given upon oath 185
An agreement to take an oath by the parties to a suit filed in Court is not an adjustment by mutual agreement or compromise within

Page.

the meaning of Section 98 of the Code of Civil Procedure 422

See JURISDICTION (Rulings.) ... iii

PARTIES TO SUIT.

The puttadars of a ryotwari village have not such a common interest, as puttadars, in all their holdings that they can jointly sue for the recovery of them.

If in any case such a right exist, it must be established by evidence 108

See HINDU LAW 176

See SURETY 190

A suit to recover the value of goods distrained for rent under Madras Act VIII of 1865 and forcibly carried away from the person distraining may be brought in in a Court of Small Causes either by the landlord or the person authorised to distrain 401

The Committee of a District duly appointed under Act XX of 1863 are entitled to maintain a suit in a Civil Court without having obtained the leave of the Court to bring the suit, as well when the object of the suit is to establish their right of control under Section 3 of the Act, as when it is sought to enforce such control against the officers of the Temple subordinate to them 404

See DAMAGES 410

The defendant was sued as the Trustee of a pagoda to recover a certain sum of money for which he had not accounted. The defendant was dismissed by three members of the District Committee, which consisted of six members, the other three members refusing to sign the order of dismissal. The plaintiffs were appointed trustees in place of the defendant by the members who dismissed the defendant.

Held, that the appointment of the plaintiffs was invalid, and that they were not entitled to sue the defendant 443

PARTITION.

See LIMITATION 10

Semble.—The right to enforce a partition or allotment of the common lands of mirasi villages held on pangavaly tenure probably does exist. 285

See HINDU LAW 307

Upon a division of family property, the parties to the division entered into an agreement that the property of any one of the parties to the agreement or their heirs dying leaving no issue should not be sold or transferred as a gift, but should on his death be divided by the other shareholders.

In a suit by one of the shareholders to recover the share to which the plaintiff was entitled under the agreement from the defendant, a purchaser from the son of the person to whom the property was allotted upon the division.

Held, that an estate cannot be made subject to a condition which is repugnant to any of its ordinary legal incidents, and that the power of disposition, being a legal incident of the es-

Page.

tate which passed to the vendor, could not be taken away by the agreement... 345

See LIMITATION 354

PENAL CODE.

To constitute the offence of false personation under Section 205 of the Penal Code, it is not enough to shew the assumption of a fictitious name; it must also appear that the assumed name was used as a means of falsely representing some other individual.

Reg. v. Bhitto Kubar (1 Indian Jurist 123,) dissented from. 18

In a charge under Section 498 of the Penal Code, the words of the Section "conceals or detains" must be taken to extend to the enticing or inducing a wife to withhold or conceal herself from her husband, and assisting her to do so, as well as to physical restraint or prevention of her will or action. Depriving the husband of proper control over his wife for the purpose of illicit intercourse is the gist of the offence, and a detention occasioning such deprivation may be brought about simply by the influence of allurements and blandishments ... 20

Proof of contradictory statements on oath, or solemn affirmation, without evidence as to which of them is false, is sufficient to justify a conviction, upon an alternative finding, of the offence of giving false evidence, under Section 72 of the Indian Penal Code and Sections 242, 381, and 382 of the Criminal Procedure Code.... ... 51

Page.

See APPEAL 146

To constitute the offence of escaping from transportation under Section 226 of the Penal Code, it is essential that the convict should have been actually sent to a Penal settlement and have returned before his term of transportation had expired or been remitted. .. 152

Where a prisoner had escaped from custody whilst on his way to undergo sentence of transportation,

Held, that he had committed an offence punishable under Section 224 and not under Section 226 of the Penal Code. 152

A Hindu, who has become a convert to Christianity, is not under a legal obligation to speak the truth, unless his evidence be given under the sanction of an oath on the Holy Gospels, so as to justify a conviction under Section 193 of the Indian Penal Code.

A statement made by a witness in a criminal trial not upon oath or solemn affirmation is not a declaration within the meaning of Section 199 of the Penal Code, nor is the witness bound to make a declaration under Section 191... ... 185

A conviction under Section 188 of the Penal Code for disobedience of an order duly promulgated by a public servant will not stand where the evidence fails to show that the disobedience caused or tended to cause obstruction, annoyance, or injury, or risk of obstruction, annoyance,

Page.

or injury to any person lawfully employed, or that it caused, or tended to cause danger to human life, health, or safety, or caused or tended to cause a riot or affray. (Rulings)........... vi

To constitute the offence of mischief according to the Penal Code, the act done must be shown to have caused destruction of some property or such a change in the property or the situation of it as destroys or diminishes its value or utility or affects it injuriously. The probable consequential damage to other property would not of itself constitute mischief (Rulings.) xvi

A conviction under Section 181 of the Penal Code is good, though the offence fall within Section 193.

But a sentence under Section 181 which awards no term of imprisonment is illegal. (Rulings) xviii

A conviction for theft under the Penal Code is illegal if the owner has given up all property in and all possession of the subject of the alleged theft. (Rulings) ... xxx

A village shroff, whose duty it was to assist in collecting the public revenue, received grain from ryots and gave receipts as if for money received, by virtue of a private arrangement. *Held* that he could not be convicted of criminal breach of trust by a public servant under Section 409 of the Penal Code, as he was not authorised to receive the public revenue in kind, and the party who delivered the grain did not thereby discharge himself from liability for the revenue. (Rulings) ... xxiii

According to Section 114 of the Penal Code, if the nature of the act constitutes abetment, the abettor, if present, is to be deemed to have committed the offence, though in point of fact another actually committed it. (Rulings)... ... xxxvii

The offence of dishonest retention of stolen property under Section 411 of the Penal Code may be complete without any guilty knowledge at the time of receipt. (Rulings) xlii

The death of the husband does not necessarily put an end to a prosecution for adultery under Section 497 of the Penal Code. (Rulings). lv

Upon a prosecution under Section 318 of the Penal Code, a person cannot be convicted of concealing the birth of a child in the case of a mere fœtus four months old (Rulings) lxiii

Where the defendants, ryots of portion of a zemindary, sold in execution of a decree of the Civil Court, reaped and carried away their crops despite the purchaser's people and refused to allow the purchaser's people to seal and mark grain which had been reaped, and the ryots were assembled in such numbers and so armed that nothing could be done against them, *Held*, by the High Court, that the acts of the defendants did not amount to an

Page.
offence under Section 141 of the Penal Code. (Rulings) lxv

POSSESSION.

See TITLE 478
See CRIMINAL PROCEDURE CODE.

PREVIOUS CONVICTION.

See CRIMINAL PROCEDURE CODE. (Rulings) xi

PRIORITY OF CREDITORS.

A mortgagee is not entitled to be paid from the sale proceeds of property attached and sold in a suit instituted by a creditor of the mortgagor in preference to the judgment creditor at whose instance the property was attached.

The surplus, if any, may be paid to the mortgagee, there being no other unsatisfied decrees against the mortgagor, provided the sale was not made with notice that the right, title, and interest of the execution debtor was that of mortgagor ... 49

The mere possession of the title-deeds by a second mortgagee, though a purchaser for valuable consideration without notice, will not give him priority. There must be some act or default of the first mortgagee to have this effect 369

The plaintiff brought a suit on an instrument dated 1861, described as a mortgage bond, to recover the amount due by a decree against the first defendant personally and against the mortgaged property which was in the possession of the 2nd defendant under a registered deed of sale by the 1st defendant to him in 1866. The Civil Judge gave a decree against the 1st defendant, but refused the prayer against the second defendant on the ground that he was a *bond fide* purchaser for valuable consideration without notice. *Held*, by the High Court, that the plaintiff was entitled to a decree against the property in the possession of the 2nd defendant for satisfaction of the debt, whether the instrument sued on was a mortgage, or whether its effect was merely to create a lien 434

PRISONER IN FETTERS.

A Judge should not refuse to try a prisoner brought up in chains to stand his trial, but the Judge may direct the removal of the fetters unless satisfied by a representation from the proper officer that they are necessary. (Rulings) lxix

PROMISSORY NOTE.

See LIMITATION 366

PROPERTY LIABLE TO PARTITION.

Property acquired by a Hindu while drawing an income from his family is liable to partition, and the quality of the fund cannot be altered by the mode of its investment 5

PUTTADARS.

The puttadars of a ryotwari village have not such a common interest, as puttadars, in all their holdings that they can jointly sue for the recovery of them.

If in any case such a right exist, it must be established by evidence 108

PUTTAH.

See RECOVERY OF RENT 149,243,393

Under Madras Act VIII of 1865, a landlord may compel a tenant to accept a puttah for palmyra trees ... 398

See WASTE LANDS 429

Page.

RATIFICATION.

Held, that the evidence showing that the acts of trespass by one of the defendants were for the benefit and on behalf of the members of the Committee and were afterwards adopted and taken advantage of by them when they had acquired a full knowledge of those acts, the defendants for whose benefit the acts were done were liable for the trespass. ... 410

RECOGNIZANCE.

See WITNESS (Rulings) ... vi
See MAGISTRATE (Rulings) ... xvii, [xviii, xliv

RECOVERY OF RENT.

A suit for rent is maintainable where a puttah in the form required by Section 4, Act VIII of 1865, (Madras), and such as the defendant was bound to accept has been tendered to the defendant, although no attempt has been made by a summary suit before the Collector to enforce its acceptance ... 149

Madras Act VIII of 1865, Section 6, imposes upon village kurnums the duty of signing and registering puttahs and muchilkas exchanged under the Act. Where such puttahs and muchilkas were not signed or registered by the kurnum,

Held, that a suit for rent may be maintained, founded upon the muchilka, the signature and registration by the kurnum not being intended to be a condition of the right to sue 243

See REVIEW OF JUDGMENT ... 251

A suit was brought in the Small Cause Court by a Zemindar against a ryot for arrears of rent. The plaintiff alleged that he had tendered puttahs which the defendant was bound to accept, and the defendant alleged that the rent specified was such that he was not bound to accept the puttahs.

Held, that the suit was not cognizable by a Court of Small Causes, there being no contract between the parties for the payment of rent. 393

REGISTRATION.

The only two things which are absolutely required by Section 21 of Act XX of 1866 as conditions without compliance with which registration is prohibited are, first, that the instrument shall contain a description of the property sufficient to identify it, and, secondly, that if the instrument contains a map, a copy or copies of the map shall accompany the instrument when presented for registration. The other provisions of Section 21 are directory only. The circumstance, therefore, that the description of the parcels in the instrument does not specify the registration district, or sub-district, or division, or village, in which the property is situate, or the former occupancy, is not alone sufficient to disentitle a party to getting an instrument registered, if the description in the instrument is sufficient to identify the property ... 91

Upon a petition under Section 84 of Act XX of 1866, the District Court is bound to ascertain whether the description is sufficient to

Page.

identify the property notwithstanding the failure to supply some particulars mentioned in Section 21, or the rules 91

It is not necessary that the executing party should attend in Court, pursuant to notice served under Section 84, in order to authorise the Court to order the registration of the instrument. Under Section 84, the Court is not bound to direct registration of the instrument even if satisfied that the requirements of the law have been complied with, though in the exercise of this discretion the Court ought not to refuse registration unless very clearly satisfied that the registration will work injustice. ... 91

The verified statement, in the petition for registration, of the execution of the instrument is not, when the executing party fails to appear in Court, sufficient proof of the execution, in order that the Court may direct registration. 91

Semble, the words "the Revenue officer in whose jurisdiction the person whose attendance is desired may be," in Section 40 of the Act point to the chief Revenue officer of the district, viz., the Collector, or, if in any defined sub-district, the Sub-Collector; such Sub-Collector has all the powers of a Collector. 91

Where an executing party to a document appears before the registering officer and admits execution, but refuses to sign on the back of the instrument as admitting the execution or do any other act towards its registration, the registering officer cannot, without the order of the District Court under Section 84 of Act XX of 1866, proceed with the registration of the instrument, as the provisions of Sections 66 and 67 could not be complied with. Denial of the receipt or part of the consideration money by the executing party is not a sufficient ground for the District Court refusing registration under Section 84 of the Act 101

Where two instruments are contained in the same paper and relate to the same property and are both presented for, and in all other respects are entitled to, registration, it is not a sufficient ground for refusing registration that in one of the documents the property is described only by reference to the other.... 101

When any question arises under the Registration Act as to the nature or effect of any instrument, or the sufficiency of any description contained in it, the Court must endeavour to gather from the words used the intention of the parties and give effect to it, and not require, as a condition of registration, that the instrument be drawn up in technical language 101

Though in the latter of two instruments there are no words directly referring to the first, yet the frame of the documents showing that the second document

Page.

should be taken to refer to the first, the second document must be taken to contain a sufficient reference to the first... 101

Refusal by the executing party to initial an apparent alteration not materially affecting the instrument, unaccompanied by any suggestion that the alteration was improperly made after execution, does not render the document non-registrable... 101

Where an instrument purports to create an interest in immoveable property only as a collateral security for the payment of money, and is also a simple contract or bond for the payment of a debt, and where effect is sought to be given to the instrument only as a simple contract, it is admissible in evidence in a suit to recover the debt though it has not been registered. So far as it is a contract for the payment of money, it is an instrument, the registration of which is made optional by Section 18 of Act XX of 1866 *(overruled)* ... 174

The summary remedy under Section 53 of the Registration Act is made applicable only as between the immediate parties to the registered obligation. Such remedy cannot therefore be enforced by the representative of an obligee. 233

See LIMITATION 366

An instrument operating to create an interest in immoveable property, and as such requiring to be registered under Sec. 17 of Act XX of 1866, and also evidencing a personal obligation, is not admissible in evidence in a suit to enforce the personal obligation only 378

A permanent lease of a village in a muttah by the Muttahdar (plaintiff's father) is not invalidated by Section 8 of Regulation XXV of 1802, although the lease has not been registered as required by that Section 396

Subrayalu Naick v. *Ramma Reddy*, 1 Madras High Court Reports, 143, overruled. ... 396

In a suit under Section 15 of the Registration Act of 1864, (XVI of 1864), to compel the defendant to join in the registration of certain documents, the defendant admitted the execution of the documents, but set up a collateral agreement which would render the documents of no legal force. The Lower Courts found that the agreement relied on by the defendant was come to with the plaintiff.

Held, (reversing the decrees of the Lower Courts) that, execution having been admitted, the document ought to be registered. 425

The plaintiff brought a suit on an instrument, dated 1861, described as a mortgage bond, to recover the amount due by a decree against the first defendant personally and against the mortgaged property which was in the possession of the 2nd defendant under a registered deed of sale by 1st defendant to him in 1866. The Civil Judge gave a decree against the 1st defendant, but refused the prayer against the 2nd

Page.

defendant on the ground that he was a *bonâ fide* purchaser for valuable consideration without notice.

Held, by the High Court, that the plaintiff was entitled to a decree against the property in the possession of the 2nd defendant for satisfaction of the debt, whether the instrument sued on was a mortgage, or whether its effect was merely to create a lien. 434

A perpetual or permanent lease at a low fixed rent made by a Zemindar who obtained the zemindary by self-acquisition is binding upon the Zemindar's successors although the instrument was not registered under Regulation XXV of 1802 ... 463

REGISTRATION OF PUTTAHS AND MUCHILKAS.

See RECOVERY of Rent ... 243

REGULATIONS.

Regulation XVII *of* 1802.

See PRIORITY *of* CREDITORS... 434

Regulation XXIX *of* 1802.

See INHERITANCE 234

Regulation XXV *of* 1802.

See REGISTRATION... ... 396

See ZEMINDAR 463

Regulation IV *of* 1816.

See JURISDICTION 188

Regulation XII *of* 1816.

See DEPUTY COLLECTOR (Rulings) i

Regulation XIV *of* 1816.

See VAKIL (Rulings) ... xliii

Regulation IV *of* 1831.

See ATTACHMENT 277

Regulation VI *of* 1831.

See INAM 70

RE-PAYMENT.

See LIMITATION 330

RENT.

See RECOVERY of Rent ... 149

By an agreement entered into between the predecessors of the plaintiffs, Durmakartas of a Temple, and the defendants, it was provided that the defendants should have a permanent right of cultivating certain lands belonging to the Temple upon payment of the circar tirva and a swamibogam mentioned in the agreement. Subsequently to the agreement the Government notified that the melvarum payable to the Government would be thenceforth permanent and not according to the nerick ascertained by reference to the market prices in certain towns, and the Government stated that any advantage arising from the change of system should go to the ryots themselves.

The plaintiffs sued the defendants to recover the balance of the market value of the produce of the land cultivated by the defendants after deducting the amount of circar kist paid by them.

Held,—(reversing the decrees of the Lower Courts) that the defendants were only liable to pay the amount of swamibogam mentioned in the agreement, and that no right was acquired by the plaintiffs by virtue of the subsequent arrangement made by the Government... 320

RES JUDICATA.

The plaintiffs, mirassidars of a village held on pangavaly tenure, sued their co-mirassidars, the owners of the remaining shares, and others, occupants of land in the village, for a partition of the common lands of the village, and an allotment to

Page.

the plaintiffs of specific parts thereof proportionate to the shares which they represent.
In a former suit to which all the present mirassidars were parties, either actually or as privies to those through whom they claim, it was decided that no right existed in any individual shareholder of the village to have allowed to him a distinct portion of the common lands in proportion to his share or shares.
Held, that the former decree declaring the impartibility of the common lands of the village was conclusive in the present suit between the present shareholders upon the same question of right.. 285

See JURISDICTION 349

RETENTION OF STOLEN PROPERTY.

See PENAL CODE.—(Rulings). xlii

REVIEW OF JUDGMENT.

A Civil Court in hearing an appeal from the decision of a Collector under Madras Act VIII of 1865, must be guided by the Civil Procedure Code, and the judgment of the Civil Court may be reviewed under Section 376 of the Code. The order granting a review is final... 251
Semble.—The terms of Section 57 of Act VIII of 1865 are wide enough to justify a Collector in treating as *ex-parte* a defendant not appearing on the day to which the hearing of the suit may have been adjourned under Section 66 of the Act. ... 251

RIGHT OF WAY.

See CRIMINAL PROCEDURE CODE.—(Rulings) xii

Page.

SALT LAWS.

Being in possession of Salt-earth from which Salt may be manufactured with the object of making Salt is an offence under the Salt Laws.—(Rulings) liii

SEAL.

In agreements between natives of this country, the law does not distinguish between those which are under seal and by parol 98

SECURITY FOR GOOD BEHAVIOUR.

See CRIMINAL PROCEDURE CODE. (Rulings) xlvii

SELF-ACQUISITION.

See ZEMINDAR 463

SENTENCE.

See CRIMINAL PROCEDURE CODE. 242
A Session Judge has no authority to suspend his own sentence.—(Rulings) ii
A Sentence under Section 181 of the Penal Code, which awards no term of imprisonment, is illegal.—(Rulings).xviii
A sentence duly passed and recorded cannot be revised by the Judge.—(Rulings) ... xix
Where prisoners are convicted of separate offences, a separate sentence should be passed in each case with a direction that the imprisonment in the second case should commence on the expiration of that in the first and so on.—(Rulings) xxvii
The High Court has power to mitigate a sentence passed by a Magistrate and confirmed on appeal by the Session Judge, under Sections 405 and 428 of the Criminal Procedure Code.—(Rulings)...xxxvi
Where a Magistrate convicts a person of an offence, he is bound to pass some sentence.—(Rulings) ... lxvi

Page.

SET OFF.

The right of set off exists where there are cross-demands arising out of one and the same transaction, or where they are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross suit. In a suit to recover money due under a contract made between the plaintiff and defendants,

Held, that the defendants were entitled to set off the amount of damages which the defendants had proved they had sustained by reason of the plaintiff's breach of the contract sued on 120

SMALL CAUSE COURT.

See JURISDICTION...149,334,401,447
See EXECUTION OF DECREE ... 331
See RECOVERY OF RENT. ... 393

SPECIAL APPEAL.

A Special Appeal lies to the High Court from orders passed by Lower Appellate Courts on applications for execution of decrees ... 32

The question whether there was a sufficient ground for the dismissal of a pagoda hereditary servant, by a Dharmakarta, is one of degree and not of principle, and must therefore depend upon the circumstances of each case.

The finding of the Lower Courts upon such matters must be treated by the High Court on special appeal as a conclusive finding upon a matter of fact, unless it be supported by no evidence whatever 63

Page.

Plaintiffs sought to eject the defendants from certain land, of which the defendants had wrongfully taken possession, and on which they erected a building. The defendants alleged that the land had been exchanged for another piece of land now in the possession of the plaintiff. The facts found were that there was, with the assent of the 1st plaintiff, an agreement to make an exchange, and that in pursuance of that agreement the boundaries were marked out and the building commenced and continued with the knowledge of the plaintiff from August 1865 to January 1866, when the plaintiffs first interfered to stop it, but that the plaintiffs were in possession of the land given in exchange. The Lower Courts dismissed the suit.

Held, on special, appeal, that, there being no evidence to prove that the land sued for had become the property of the defendants, but the plaintiffs having acquiesced in the defendants taking possession and building upon it, and the plaintiffs having retained possession of the adjacent land, the proper decree to make was that the plaintiffs, on giving up the land of which they had taken possession and paying the defendants the value of the buildings, were entitled to the possession of the land sued for 312

STAMP.

Where a written contract liable to an optional stamp is

Page.

put in evidence by the defendants, the plaintiff cannot recover a larger amount under it than (if stated) the optional stamp upon the instrument would have been sufficient to cover. In a suit for the recovery of money due under a written contract, the defendants admitted that a sum of Rupees 6,328-4-0 was due to the plaintiff, subject to certain deductions which they claimed to be entitled to set off against the plaintiff's claim. The defendants put in evidence the written contract, the stamp upon which was only sufficient to cover the sum of rupees 5,000.

Held, that notwithstanding the admission of the defendants, the plaintiff could only recover Rupees 5,000 in the suit. 120

A written instrument which is a lease does not require to be stamped by virtue of the exemption to Article 42, Schedule A of Act X of 1862 153

Secondary evidence cannot be given of a lost instrument requiring a stamp which was not stamped... ... 312

Quaere.—Whether permission to pay the Stamp duty and penalty can be given in the case of a lost instrument ... 312

See EXECUTION OF DECREE ... 331

With the exception of the depositions of the witnesses and the documentary evidence and copies of final sentences or orders passed by Criminal Courts which parties desirous of appealing from such sentence are required by Section 416 of the Code of Criminal Procedure to file with their petition of appeal, when the party who is desirous of appealing is in confinement under the operation of the sentence or order at the time that he applies for a copy of the same, copies of any part of the record of a Criminal trial can only be furnished to applicants on Stamp paper.—(Rulings) ... lviii

SUDRA.

See INHERITANCE 204

SUIT.

SUIT ON BOND AGAINST LEGAL REPRESENTATIVES OF OBLIGOR WHO WAS SUPPOSED TO BE DEAD.

See LIMITATION.

SUIT BY JOINT-PUTTADARS.

See PARTIES TO SUIT ... 108

SUIT BY SERVANT OF TEMPLE FOR DISMISSAL.

See ACT XX OF 1863 ... 112

SUIT TO ENFORCE AWARD.

See AWARD 119

Where arrears of maintenance can be recovered by process of execution, they cannot be made the subject of a fresh suit 183

A suit may be maintained against a surety according to Hindu Law, although the principal debtor has not been sued 190

A suit does not lie to enforce a liability specifically imposed by the decree of a Civil Court in the Mofussil, the right of suit in such cases being taken away by Section XI of Act XXIII of 1861 453

The plaintiffs were in possession of certain immoveable property, when the Joint-Magistrate, under Section 319 of the Criminal Proce-

Page.

dure Code, placed the 1st defendant in possession until the rights of the parties should be determined by a competent Civil Court.

Held, in a suit to recover possession of the property instituted more than six months after the plaintiffs were dispossessed, that the plaintiffs could not recover without showing title ... 478

SUMMARY REMEDY.

See REGISTRATION. 233

SUNDAY.

Arrest under Civil process of a Mofussil Court on Sunday is legal in this country.—(Rulings)... lxiii

SURETY.

A suit may be maintained against a surety according to Hindu Law, although the principal debtor has not been sued... 190

See MAGISTRATE.—(Rulings).... xlv

Section 294 of the Code of Criminal Procedure does not authorise the imprisonment of Sureties.—(Rulings) ... lxix

SURVIVING CO. CONTRACTOR.

See JURISDICTION 447

SWAMIBOGAM.

See RENT 320

TEMPLE.

See Act XX of 1863.

See COMMITTEE OF DISTRICT... 443

THEFT.

See PENAL CODE.—(Rulings). xxx

TITLE.

The plaintiffs were in possession of certain immoveable property, when the Joint-Magistrate, under Section 319 of the Criminal Procedure Code, placed the 1st defendant in possession until the rights of the parties should be determined by a competent Civil Court.

Page.

Held, in a suit to recover possession of the property instituted more than six months after the plaintiffs were dispossessed, that the plaintiffs could not recover without showing title. ... 478

TORT.

See RATIFICATION. 410

TRESPASS.

See RATIFICATION. 410

TRIAL.

See CRIMINAL PROCEDURE CODE.—(Rulings) xxxix

A Judge should not refuse to try a prisoner brought up in chains to stand his trial, but the Judge may direct the removal of the fetters unless satisfied by a representation from the proper officer that they are necessary.—(Rulings.)... lxix

VAKIL.

When a suit is remitted by order of an Appellate Court for re-hearing or finding on an issue, the proceedings on such order must be regarded as a further proceeding in the trial of the suit, and consequently under Section 22 of Regulation XIV of 1816 a Vakil cannot change sides and hold a vakalutnamah for the party opponent to the one for whom he appeared at the first hearing.—(Rulings)... xliii

VILLAGE MIRASI.

See PARTITION... 285

See WASTE LANDS 429

VILLAGE MUNSIF.

See JURISDICTION 188

The head of a village is within the definition of a Magistrate as defined in Sec. 15 of the Criminal Procedure Code.—(Rulings) ii

Page.

VILLAGE—(Ryotwari.)

The puttadárs of a ryotwári village have not such a common interest, as puttadárs, in all their holdings that they can jointly sue for the recovery of them.

If in any case such a right exist, it must be established by evidence... 108

VOLUNTARY DECLARATIONS OF TRUST.

Quaere.—Whether Hindu Law admits of the principle on which Courts of Equity in England hold voluntary declarations of trust to be binding against the declarant 460

WASTE LANDS.

The plaintiffs sued, as the mirassidars of a village, to establish their right to the grant of a puttah of certain waste lands of the village which had been granted to some of the defendants. The Collector, who was made a defendant, stated that the Hukumnamah Rules of the district directed that land should be given to mirassidars on their tendering sufficient security, and that the plaintiffs on previous occasions had received lands for which offers had been made by others in consideration of the plaintiffs' preferential right, but that they had failed to cultivate the lands or pay the assessment in breach of their agreements.

Held, that the plaintiffs were entitled to the relief sought for. 429

WATER.

See EASEMENT TO THE USE OF WATER 98

WIDOWER.

See ADOPTION 270

Page.

WITNESS.

WITNESSES FOR PRISONER.

A prisoner who was about to be committed to the Session Court presented to the Magistrate a list of witnesses, whom he desired to have summoned to give evidence on his behalf at the trial, and on being asked by the Magistrate why he desired to summon the witnesses, the prisoner declined to state his reason. ...

Held, that the Magistrate was at liberty to decline to summon the persons named in the list on the prisoner declining to satisfy him that they were material witnesses; but the Magistrate ought to have fixed the amount which he considered necessary to defray the cost of the attendance of the persons named, and intimated to the prisoner his readiness to issue summonses on that amount being deposited.

The High Court called for the record for the purpose of seeing whether any of the persons named in the list were likely to be able to give material evidence. ... 81

WITNESS (DEFENDANT) REFUSING TO PRODUCE ACCOUNTS.

See CIVIL PROCEDURE CODE... 142

A defendant in a suit summoned by and examined as a witness for the plaintiff, is entitled to protection from arrest on civil process during the time reasonably occupied in going to, attending at, and returning from, the place of trial ... 145

Page.

STATEMENT BY WITNESS NOT UPON OATH.

See PENAL CODE 185

WRITING.

The law in this country does not require that any agreement between Natives, whether in regard to the transfer or creation of an interest in land, or otherwise, should be in writing; nor does it distinguish between agreements under seal and by parol 98

Page.

WRONGFUL POSSESSION.

See SPECIAL APPEAL 312

See LIMITATION.

ZEMINDAR.

A perpetual or permanent lease at a low fixed rent made by a Zemindar who obtained the zemindary by self-acquisition is binding upon the Zemindar's successors, although the instrument was not registered under Regulation XXV of 1802, Section 8 463

SCOTTISH PRESS:—GRAVES, COOKSON AND CO.